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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 412

MARI TOLLEFSEN TODOK AND KNUTE C. ENGEN, PETITIONERS,

vs.

UNION STATE BANK OF HARVARD, NEBRASKA, A CORPORATION; LEROY A. MEGRUE ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

PETITION FOR CERTIORARI FILED SEPTEMBER 20, 1929

CERTIORARI GRANTED OCTOBER 21, 1929

(34,543)

( )

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[fol. 1] [Caption omitted]

[fol. 2]

IN DISTRICT COURT OF HAMILTON COUNTY

KNUTE C. ENGEN, Plaintiff,

vs.

UNION STATE BANK OF HARVARD, NEBRASKA, a Corporation; LeRoy A. Megrue, and Bertha M. Megrue, His Wife; Robert E. Brown and Anna S. Brown, His Wife, and H. G. Thomas, Administrator of the Estate of Christian Knudson, Deceased; Theodore Griess and First Trust Company of Lincoln, Nebraska, and Mari Tollefsen Todok, Defendants

AMENDED PETITION—Filed Oct. 1, 1925

The plaintiff for cause of action against the defendants alleges:

1. That he is the son and only lawful heir of Christian Knudson, who died intestate, a resident of Hamilton County, Nebraska, on August 6, 1923.

2. That at the time of his death and for a long time prior thereto and on July 17, 1923, said Christian Knudson was blind and was not able to read or write; that for a long period of time he had transacted business with the Union State Bank of Harvard, Nebraska, and had great confidence in said corporation and he implicitly trusted its officers and directors; that for a long period of time prior to his death, he transacted no business except on advice of said Union State Bank and its officers, directors and stockholders.

3. That the defendants LeRoy A. Megrue and Bertha M. Megrue, Robert E. Brown and Anna S. Brown were nephews and nieces of said Christian Knudson and they were on the 17th day of July, 1923, deeply indebted to the Union State Bank of Harvard, Nebraska, and were insolvent for the reason that their liabilities exceeded their

assets and the said Union State Bank of Harvard, Nebraska, had no means of securing from said Megrues and said Browns the amount due it on promissory notes.

4. That on or about July 17, 1923, the said Christian Knudson was blind and was ill with a serious malady which terminated his life about three weeks later; that said Union [fol. 3] State Bank and its officers, directors and stockholders and said defendants Megrue and Brown conspired to influence and compel said Christian Knudson to deed to the defendants Megrue eighty acres of land and to the defendants Brown eighty acres of land and thereafter the said Union State Bank and its officers, directors and stockholders, prior to the delivery of said deeds, did compel said Megrues and said Browns to deed said real estate to the said Union State Bank of Harvard, Nebraska, for the purpose of paying the debts of said defendants Megrue and said defendants Brown to said Union State Bank of Harvard, Nebraska, and pursuant to said conspiracy the officers, agents, directors and stockholders of said Union State Bank of Harvard, Nebraska, took possession of said Christian Knudson and by the exertion of undue influence and over-persuasion and without consideration induced said Christian Knudson to put his mark on certain instruments, one of which was a deed to LeRoy A. Megrue and Bertha M. Megrue, conveying the North Half of the South West Quarter of Section 35, Township 9, Section 7, West of the 6th P. M., in Hamilton County, Nebraska, and one of which was a warranty Deed conveying to the defendants Robert E. Brown and Anna S. Brown the South Half of the Northwest Quarter of Section 35, Township 9, Range 7, West of the 6th P. M. Hamilton County, Nebraska; that said Christian Knudson, being at the time totally blind and there being no one present except the officers, agents, directors and stockholders of said Union State Bank of Harvard, Nebraska, which corporation was vitally and beneficially interested in the conveyance of said land to said defendants Megrue and Brown, said Knudson in his blind, helpless, incompetent condition and by reason of his confidence and trust in the officers of said Bank with which he had transacted business for a great number of years did not comprehend, realize and know the contents

of said instruments and did not knowingly and willingly and voluntarily make his said mark upon said instruments to thereby convey said real estate without consideration to said defendants Megrue and said defendants Brown, but said act was wholly and entirely the act of said Union State Bank of Harvard, Nebraska, and its officers, agent, directors and stockholders in pursuance of their conspiracy to transfer to the debtors of said Bank, the defendants Megrue and the defendants Brown, valuable real estate belonging to said Christian Knudson so that defendant Union State Bank of Harvard, Nebraska, might thereby and thereafter by influence and threats compel and induce said Megrues [fol. 4] and said Browns to deed said real estate to it, the defendant Union State Bank of Harvard, Nebraska, in payment of the indebtedness of said defendants Megrue and said defendants Brown to said Union State Bank, and was not the act of said Christian Knudson.

5. That at the time of his death three weeks later, the said Christian Knudson had in his possession and ownership the note of said LeRoy A. Megrue for $5000.00, which said note had been sold to said Knudson by the Union State Bank of Harvard, Nebraska, for full face value, although said note was of little or no value by reason of the insolvency of said LeRoy A. Megrue, and said asset is and was worthless to said estate.

6. That shortly after the defendant Union State Bank through its officers, agents, directors and stockholders had secured the conveyances heretofore described without consideration, they returned said Christian Knudson to his former home, but at no time informed the relatives and friends of said Christian Knudson of the alleged execution of said deeds and did not notify or inform said Browns or said Megrues of said deeds until long after the death of said Christian Knudson on August 8, 1923, that upon his return to his home the said Christian Knudson had no knowledge of the execution of said deeds, and said execution was without consideration and was false, fraudulent and void, and was brought about solely by reason of the blind, helpless condition of said Knudson and the undue influence exerted over him by the defendants.

7. That immediately after the death of said Christian Knudson the defendant Union State Bank of Harvard, Nebraska, in pursuance of its conspiracy to save itself from loss by reason of its extensive and extravagant loans to said defendants Megrue and said defendants Brown by transferring the above described real estate from said Christian Knudson to said Megrues and said Browns, notified said Megrues and said Browns that it held said deeds and endeavored to persuade said Megrues and said Browns to deed said real estate over to it, the Union State Bank of Harvard, Nebraska, in part payment of the indebtedness due to said Union State Bank from said defendants Megrue and said defendants Brown; that for a long time the said defendants Megrue refused to so deed said real estate and the said Union State Bank of Harvard, Nebraska, refused to deliver the deed held by it and purported to be signed by said Christian Knudson by mark conveying to said Megrues the North Half of the Southwest Quarter [fol. 5] of section 35, township 9, Range 7, West of the 6th P. M. in Hamilton County, Nebraska, but on or about October 2, 1923, the defendants Megrue did accede to said demand and for a consideration of $9600.00 did execute and deliver a deed of said premises conveying same to said Union State Bank of Harvard, Nebraska, and did receive credit for $9600.00 on the indebtedness due said Union State Bank from said Megrues.

8. That the said Union State Bank in the same way approached the defendants Brown and did by persuasion secure from them a deed for the South Half of the Northwest Quarter of Section 35, Township 9, Range 7, West of the 6th P. M. in Hamilton County, Nebraska, for the consideration of $8000.00 and did credit said defendants Brown with $8000.00 upon their indebtedness due to said Union State Bank.

9. That the Warranty Deed alleged to have been signed by said Christian Knudson by mark conveying to LeRoy A. Megrue and Bertha M. Megrue the North Half of the Southwest Quarter of Section 35, Township 9, Range 7, West of the 6th P. M. was acknowledged before H. G. Thomas, as Notary Public, the Cashier and member of the board of directors and stockholders of the said Union State

Bank; that the witnesses to said deed and to the mark of said Christian Knudson were Ambrose C. Epperson and Theodore Griess, stockholders and directors of said Union State Bank. A true copy of said deed as taken from the records of Hamilton County, Nebraska, is attached hereto, as Exhibit "A", and made a part of this petition by special reference.

10. That the Warranty Deed alleged to have been signed by said Christian Knudson conveying to Robert E. Brown and Anna S. Brown the South Half of the Northwest Quarter of Section 35, Township 9, Range 7, West of the 6th P. M. was acknowledged before H. G. Thomas as Notary Public, the Cashier and member of the Board of directors and stockholders of the said Union State Bank; that the witnesses to said deed and to the mark of said Christian Knudson were Ambrose C. Epperson and Theodore Griess, stockholders and directors of said Union State Bank. A true copy of said deed as taken from the records of Hamilton County, Nebraska, is attached hereto as Exhibit "B" and made a part of this petition by special reference; that the real estate attempted to be conveyed in said deeds was the homestead of said Christian Knudson and both the acknowledgment and deeds were utterly void because they were acknowledged before a Notary Public who was a stock-[fol. 6] holder of the Union State Bank, a corporation, and ben-ficiarlly interested in said deeds in that the said officers and stockholders of said bank obtained said deeds through fraud and undue influence in order that the defendants Megrue and defendants Brown could pay their debts to said bank with said real estate, and they were void because of the undue influence exerted by said Union State Bank and its officers and stockholders and obtained without consideration; that neither of said deeds was delivered.

11. That the deed from LeRoy A. Megrue and Bertha M. Megrue, husband and wife, to Union State Bank of Harvard, Nebraska, for the consideration of $9600.00 conveying the North Half of the Southwest Quarter of Section 35, township 9, Range 7, West of the 6th P. M. was acknowledged and witnessed by George A. Herzog, Notary Public, and a true copy of samd as taken from the records of

Hamilton County, Nebraska, is attached hereto and identified as Exhibit "C" and by special reference made a part of this petition.

12. The Warranty Deed signed, executed and delivered by Robert E. Brown and Anna S. Brown conveying to the Union State Bank of Harvard, Nebraska for a consideration of $8,000.00 the South Half of the Northwest Quarter of Section 35, Township 9, Range 7, West of the 6th P. M. in Hamilton County, Nebraska, is dated September 15, 1923, and a true copy of the same as taken from the records of Hamilton County, Nebraska, is attached hereto and identified as Exhibit "D" and made a part hereof by special reference.

13. That all of said deeds identified as Exhibits A, B, C and D were filed for record in the office of the County Clerk of Hamilton County, Nebraska, by the Union State Bank of Harvard, Nebraska, on October 5, 1923, and on said date the Union State Bank of Harvard, Nebraska, did by deed convey to LeRoy A. Megrue by an instrument dated October 2, 1923, the Northeast Quarter and the Northeast Quarter of the Southeast Quarter of Section 34, Township 9, Range 7, West of the 6th P. M. in Hamilton Sounty, Nebraska, for the consideration of One Dollar ($1.00) a true copy of said deed is attached hereto and identified as Exhibit "E" and by special reference made a part of this petition.

14. That pursuant to said conspiracy the defendant Union State Bank of Harvard, Nebraska, did on September 5, 1924, by Warranty Deed grant unto Theodore Griess, the President and one of the principal stockholders of said Union State Bank, and one of the parties to said conspiracy, [fol. 7] the legal title by warranty deed to the above described real estate and said Griess did thereafter on September 22, 1924, mortgage the South Half of the Northwest Quarter of Section 35, Township 9, Range 7, West of the 6th P. M. in Hamilton County to the First Trust Company of Lincoln, Nebraska, in the sum of $5000.00, and on same date he did mortgage the North Half of the Southwest Quarter of Section 35, Township 9, Range 7, West of the 6th P. M. to the First Trust Company of Lincoln Nebraska, in the amount of $4500.00 and thereafter on September 26,

1924, the said Griess did reconvey said real estate so mortgaged to the Union State Bank of Harvard, Nebraska; that said defendant Theodore Griess is the President of said Union State Bank and a stockholder in same, and he was without right, title or authority to so encumber said land; that said mortgages are void and of no force and effect by reason of the failure of title in said Griess at the time he thus attempted to mortgage same; that said mortgage on the South Half of the Northwest Quarter of Section 35, is recorded in Book 78, page 270 of the mortgage records of Hamilton County, Nebraska, a copy of which is attached hereto as Exhibit "E" and made a part hereof and the mortgage on the North Half of the Southwest Quarter of said Section 35 is recorded in book 78, page 286 of the mortgage records of Hamilton County, Nebraska, a copy of which is attached hereto as Exhibit "F" and made a part hereof.

15. That the plaintiff is the only legal heir of said Christian Knudson, sometimes known as Christian Engen and is the present owner of the title in fee of the above described real estate, and is entitled to possession thereof with title in fee simple free from encumbrance.

16. That by reason of the unlawful conspiracy of defendants and the undue influence exerted by defendants over plaintiff's father in procurement of said deeds, plaintiff has been cheated and defrauded out of one hundred sixty acres of excellent farm land of the reasonable value of $24,000.00 and plaintiff has been damaged thereby in the sum of $24,000.00; that plaintiff is entitled to have all of said deeds set aside as null and void and without consideration and is entitled to have said mortgages cancelled and to have his own title quieted as to said real estate.

17. That the defendant Mari Tollefsen Todok claims some right in said real estate, claiming to be the widow of said Christian Knudson, deceased.

[fol. 8] Wherefore plaintiff prays that the court may set aside as void and hold for naught the alleged deed from Christian Knudson to LeRoy A. Megrue and Bertha M. Megrue dated July 17, 1923, conveying to said grantees the North Half of the Southwest Quarter of Section 35, Town-

ship 9, Range 7, West of the 6th P. M., also the alleged deed from Christian Engen to Robert E. Brown and Anna S. Brown, dated July 17, 1923, conveying to said defendants Brown the South Half of the Northwest Quarter of Section 35, Township 9, Range 7, West of the 6th P. M. in Hamilton County, Nebraska, also the Warranty Deed from LeRoy A. Megrue and Bertha M. Megrue, husband and wife, to the Union State Bank of Harvard, Nebraska, conveying the North Half of the Southwest Quarter of Section 35, Township 9, Range 7, Hamilton County, Nebraska, dated October 2, 1923, and filed for record October 5, 1923, also the Warranty Deed from Robert E. Brown and Anna S. Brown, his wife, conveying to the Union State Bank of Harvard, Nebraska, the South Half of the Northwest Quarter of Section 35, Township 9, Range 7, Hamilton County, Nebraska, dated September 17, 1923, and filed for record October 5, 1923, also the deed from Union State Bank to Theodore Griess dated September 5, 1924, conveying the South Half of the Northwest Quarter and the North Half of the Southwest Quarter of said Section 35, Township 9, Range 7, Hamilton County, Nebraska, also the mortgage deed of said Griess to the First Trust Company of Lincoln, Nebraska, dated September 22, 1924, encumbering the South Half of the Northwest Quarter of said Section 35, Township 9, Range 7, in the amount of $5,000.00, said mortgage being recorded in Book 78, page 270 of the mortgage records of Hamilton County, Nebraska, also the mortgage deed from said Theodore Griess to the First Trust Company of Lincoln, Nebraska, dated September 22, 1924, in the amount of $4,500.00 recorded in Book 78, page 286, of the mortgage records of Hamilton County, Nebraska, also the deed from said Theodore Griess to the Union State Bank dated September 26, 1924, conveying the South Half of the Northwest Quarter of said Section 35, Township 9, Range 7, Hamilton County, Nebraska, also the deed of said Theodore Griess to the Union State Bank dated September 26, 1924, conveying the North Half of the Southwest Quarter of said Section 35, Township 9, Range 7, Hamilton County, Nebraska, and that same be stricken from the records of the County Clerk of Hamilton County, Nebraska, and plaintiff further prays that the court by proper decree quiet in this [fol. 9] plaintiff his fee simple title in and to the above described real estate, to wit: The North Half of the Southwest

Quarter and the South Half of the Northwest Quarter of Section 35, Township 9, Range 7, West of the 6th P. M. in Hamilton County, Nebraska, and in the event the court finds that the First Trust Company of Lincoln, Nebraska, is entitled to retain its lien on said real estate, then that plaintiff have judgment against the other defendants for the full amount of said mortgages, and that the court permanently enjoin the defendants and each of them from making any claim to any right, title, interest or possession in and to the said real estate and plaintiff prays for such other, further and different relief as may be just and equitable.

Hainer, Craft, Edgerton & Fraizer, Attorneys for Plaintiff.

[fol. 10] *Duly sworn to by F. E. Edgerton. Jurat omitted in printing.*

[fol. 11] EXHIBIT "A" TO AMENDED PETITION

Know all men by these presents that Christian Knudsen of the County of Clay and State of Nebraska for and in consideration of a valuable consideration, consisting of care, attention and compan-ship in hand paid, do hereby grant, bargain, sell, convey and confirm unto LeRoy A. Megrue and Bertha M. Megrue of the County of Hamilton and State of Nebraska, the following described real estate situated in Hamilton County and State of Nebraska, towit: The North Half of the Southwest Quarter (N. ½ S. W. ¼) of Section Thirty-five (35), Township Nine (9), Range Seven (7), West of the 6th P. M. The grantor hereby reserves the use of said land during his lifetime.

To have and to hold the premises above described, together with all the tenements, here*id*taments and appurtenances thereunto belonging; unto the said LeRoy A. Megrue and Bertha M. Megrue and to their heirs and assigns forever. And I do hereby covenant with the said grantees, and with their heirs and assigns that I am lawfully seized of said premises; that they are free from encumbrance; that I have good right and lawful authority to sell the same; and I do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever.

And the said —— —— hereby relinquishes all — in and to the above described premises.

Signed this 17th day of July, A. D. 1923.

Christian (his x mark) Knudsen.

In presence of and witnesses to mark: Ambrose C. Epperson, Theo. Griess.

STATE OF NEBRASKA,
Clay County, ss:

On this 17th day of July, A. D. 1923, before me the undersigned, H. G. Thomas, a Notary Public, duly commissioned and qualified for and residing in said County, personally came Christian Knudsen to me known to be the identical person whose name is affixed to the foregoing instrument as grantor and acknowledged the same to be his voluntary act and deed.

Witness my hand and Notarial Seal the day and year last written above.

H. G. Thomas, Notary Public. Com. exp. July 28, 1925. (Notarial Seal.)

[fol. 12] EXHIBIT "B" TO AMENDED PETITION

Know all men by these presents that Christian Engen of the County of Hamilton and State of Nebraska, for and in consideration of a valuable consideration consisting of care, attention, and compan-ship in hand paid, do hereby grant, bargain, sell, convey and confirm unto Robert E. Brown and Anna S. Brown of the County of Clay and State of Nebraska, the following described real estate situated in Hamilton County and State of Nebraska, towit:

The South Half of the Northwest Quarter (S.½ N.W.¼) of Section Thirty-five (35), Township Nine (9), Range Seven (7), West of the 6th P. M. The grantor hereby reserves the use of said land during his lifetime.

To have and to hold the premises above described together with all the tenements, hereditaments and appurtenances thereunto belonging; unto the said Robert E. Brown and Anna S. Brown and to their heirs and assigns forever. And I do hereby covenant with the said grantees, and with

their heirs and assigns that I — lawfully seized of said premises; that they are free from encumbrance; that I have good right and lawful authority to sell the same; and I do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever.

And the said —— —— hereby relinquishes all — in and to the above described premises.

Signed this 17th day of July, A. D. 1923.

Christian (his x mark) Engen.

In presence of and witnesses to mark: Ambrose C. Epperson, Theo. Griess.

STATE OF NEBRASKA,
Clay County, ss:

On this 17th day of July, A. D. 1923, before me the undersigned H. F. Thomas, a Notary Public, duly commissioned and qualified for and residing in said County, personally came Christian Engen to me known to be the identical person whose name is affixed to the foregoing instrument as grantor, and acknowledged the same to be his voluntary act and deed.

Witness my hand and Notarial Seal the day and year last written above.

H. G. Thomas, Notary Public. Com. exp. July 28, 1925. (Notarial Seal.)

[fol. 13] EXHIBIT "C" TO AMENDED PETITION

Know all men by these presents that LeRoy A. Megrue and Bertha M. Megrue, husband and wife, of the County of Hamilton and State of Nebraska, for and in consideration of the sum of Ninety Six Hundred Dollars, in hand paid, do hereby grant, bargain, sell, convey and confirm unto Union State Bank of the County of Clay and State of Nebraska, the following described real estate *signated* in Hamilton County and State of Nebraska, towit, the North Half of the Southwest Quarter (N.½ S.W.¼) of Section Thirty-five (35), Township Nine (9), Range Seven (7), West of the 6th P. M.

(Int. Rev. $10.00 LAM 10-2-23.)

To have and to hold the premises above described, together with all the tenements, hereditaments and appurtenances thereunto belonging unto the said Union State Bank and to its heirs and assigns forever. And we do hereby covenant with the said grantee, and with its heirs and assigns that we lawfully seized of said premises; that they are free from encumbrance that we have good right and lawful authority to sell the same; and we do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever.

And the said Bertha M. Mergrue hereby relinquishes all marital rights in and to the above described premises.

Signed this 2d day of October, A. D. 1923.

LeRoy A. Megrue, Bertha M. Megrue.

In presence of Geo. A. Herzog.

STATE OF NEBRASKA,
Clay County, ss:

On this 2d day of October, A. D. 1923, before me the undersigned, George A. Herzog, a Notary Public, duly commissioned and qualified for and residing in said County, personally came LeRoy A. Megrue and Bertha M. Megrue, husband and wife, to me known to be the identical persons whose names are affixed to the foregoing instrument as grantors and acknowledged the same to be their voluntary act and deed.

Witness my hand and Notarial Seal the day and year last above written.

Geo. A. Herzog. My commission expires the 27th day of February, 1924. (Notarial Seal.)

[fol. 14] EXHIBIT "D" TO AMENDED PETITION

Know all men by these presents that Robert E. Brown and Anna S. Brown, husband and wife, of the County of Clay and State of Nebraska (for and in consideration of the sum of Eight Thousand Dollars in hand paid, do hereby grant, bargain, sell, convey and confirm unto Union State Bank of the County of Clay and State of Nebraska, the following described real estate situated in Hamilton County

and State of Nebraska, towit: The South Half of the Northwest Quarter (S.½ N.W.¼) of Section thirty-five (35), Township Nine (9), Range Seven (7), West of the 6th P. M.

(Int. Rev., $8.00, 9-17-23. REB.)

To have and to hold the premises above described, together with all the tenements, hereditaments and appurtenances thereunto belonging unto the said Union State Bank and to its heirs and assigns forever. And we do hereby covenant with the said grantee, and with its heirs and assigns that we lawfully seized of said premises; that they are free from encumbrance; that we have good right and lawful authority to sell the same; and we do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever.

And the said Anna S. Brown hereby relinquishes all marital rights in and to the above described premises.

Signed this 17th day of September, A. D. 1923.

Robert E. Brown, Anna S. Brown.

In presence of Geo. A. Herzog.

STATE OF NEBRASKA,
Clay County, ss:

On this 17th day of September, A. D. 1923, before me the undersigned, George A. Herzog, a Notary Public, duly commissioned and qualified for and residing in said County, personally came Robert E. Brown and Anna S. Brown, husband and wife, to me known to be the identical persons whose names are affixed to the foregoing instrument as grantors, and acknowledged the same to be their voluntary act and deed.

Witness my hand and Notarial Seal the day and year last written above.

Geo. A. Herzog, Notary Public. My commission expires the 27th day of February, 1924. (Notarial Seal.)

[fol. 15] EXHIBIT "E" TO AMENDED PETITION

Know all men by these presents that the Union State Bank of the County of Clay and State of Nebraska for and

in consideration of the sum of One Dollar, in hand paid do hereby grant, bargain, sell, convey and confirm unto LeRoy A. Megrue of the County of Hamilton and State of Nebraska the following described real estate situated in Hamilton County and State of Nebraska, towit: The Northeast Quarter of Section Thirty four (34), Township Nine (9), Range Seven (7), and the Northeast Quarter (N.E.¼) of the Southeast Quarter (S.E.¼) of Section Thirty four (34) township Nine (9) Range Seven (7), West of the 6th P. M.

Int. Rev., $1.00, 10-2-23. USB.)

To have and to hold the premises above described, together with all the tenements, hereditaments and appurtenances thereunto belonging unto the said LeRoy A. Megrue and to his heirs and assigns forever. And we do hereby covenant with the said grantee, and with his heirs and assigns that we lawfully seized of said premises; that they are free from encumbrance created by the grantor; that we have good right and lawful authority to sell the same; and we do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever.

And the said —— —— hereby relinqishes all — in and to the above described premises.

Signed this 2d day of October, A. D. 1923.

Union State Bank, by Theo. Griess, President.

In presence of Geo. A. Herzog.

STATE OF NEBRASKA,
Clay County, ss:

On this 2d day of October, A. D. 1923, before me the undersigned George A. Herzog, a Notary Public, duly commissioned and qualified for and resiging in said County, personally came Theo. Griess, President of the Union State Bank to me known to be the identical person whose name is affixed to the foregoing instrument as grantor and acknowledged the same to be his voluntary act and deed.

Witness my hand and Notarial Seal the day and year last written above.

Geo. A. Herzog, Notary Public. My commission expires the 27th day of February 1924. (Notarial Seal.)

[fol. 16] EXHIBIT "E" TO AMENDED PETITION

By this instrument Theodore Griess, a widower, of the County of Clay and State of Nebraska, hereinafter called party of the first part, for the sum of Five thousand and no/100 Dollars, convey- unto The First Trust Company of Lincoln, Nebraska, and its successors and asigns, the following real estate with all the appurtenances thereunto belonging, situated in Hamilton County, State of Nebraska, to-wit: The south half of the Northwest quarter S. ½ N. W. ¼ of Section thirty-five, Sec. 35, Township Nine North, Twp. 9 N., Range Seven West, Rge. 7 W., of the Sixth Principal Meridian, 6th P. M., containing eighty acres, 80 A., more or less, according to Government Survey and warrants the title thereto perfect and clear except this mortgage.

During the time this mortgage is in force the mortgagor agrees:

First. To pay all taxes and special assessments levied against said premises, including all taxes and assessments levied upon this mortgage, or the debt secured by this mortgage.

Second. To keep all buildings thereon insured against loss by fire and tornado in some company, to be chosen by the said The First Trust Company of Lincoln, Nebraska, in the sum of $—, for the benefit of the said Trust Company, and its successors or assigns; and to deposit said policies with said Trust Company.

Third. To pay or cause to be paid to the said The First Trust Company of Lincoln, Nebraska, its successors or assigns the sum of Five thousand and no/100 Dollars on the first day of October, 1929, with interest thereon at the [fol. 17] rate of five & one-half per cent per annum, payable semi-annually, according to the tenor and effect of the one certain first mortgage bond of said Theodore Griess with interest coupons attached bearing even date with these presents. After maturity said bond draws interest at the rate of ten per cent per annum; likewise each coupon after its maturity.

If said taxes and assessments are not paid when due, or if the buildings on said premises are not insured as above provided, or if any of said interest is not paid when due, then said whole debt shall become due immediately, at the

option of the Trust Company, and shall thereafter draw interest at the rate of ten per cent per annum.

Whether said debt becomes due by lapse of time, or by reason of the failure of the party of the first party to comply with any condition herein, the said The First Trust Company of Lincoln, Nebraska, its successors and assigns, shall have the right to begin the foreclosure of this mortgage at once on the whole debt hereby secured, and to include therein all taxes, assessments, and insurance premiums paid by it or them.

After the commencement of any suit in foreclosure the plaintiff therein shall be entitled to the possession of said premises and the appointment of a receiver therefor notwithstanding they may be the homestead of the occupant.

Signed this 22nd day of September A. D. 1924

Theodore Griess.

In the presence of Elsie Korgan.

STATE OF NEBRASKA,
County of Clay, ss:

On this 24th day of September, 1924, before me the un- [fol. 18] dersigned, a notary public in and for said county, personally came Theodore Griess, a widower, to me known to be the identical person described in and whose name is signed to the above deed as grantor and acknowledged said instrument to his voluntary act and deed.

Witness my hand and notarial seal.

Elsie Korgan, Notary Public. My commission expires on the 21st day of March, 1927. (Notarial Seal.)

[fol. 19] EXHIBIT "F" TO AMENDED PETITION

By this instrument Theodore Griess, a widower, of the County of Clay and State of Nebraska, hereinafter called party of the first part, for the sum of Forty five hundred and no/100 Dollars, convey- unto The First Trust Company of Lincoln, Nebraska, and its successors and assigns, the following real estate with all the appurtenances thereunto belonging; situated in Hamilton County, State of Nebraska, to-wit: The north half of the southwest quarter N. ½ S. W.

¼ of section thirty five, Sec. 35, Township nine north, Twp. 9 N., Range seven West, Rge. 7 W., of the Sixth Principal Meridian, 6th P. M., containing eighty acres 80 A. more or less, according to government survey and warrants the title thereto perfect and clear except this mortgage.

During the time this mortgage is in force the mortgagor agrees:

First. To pay all taxes and special assessments levied against said premises, including all taxes and assessments levied upon this mortgage, or the debt secured by this mortgage.

Second. To keep all buildings thereon insured against loss by fire and tornado in some company, to be chosen by the said The First Trust Company of Lincoln, Nebraska, in the sum of $—, for the benefit of the said Trust Company, and its successors or assigns; and to deposit said policies with said Trust Company.

Third. To pay or cause to be paid to the said The First Trust Company of Lincoln, Nebraska, its successors or assigns the sum of Forty five hundred and no/100 Dollars on the first day of October, 1929, with interest thereon at the rate of five & one half per cent per annum, payable semi-annually, according to the tenor and effect of the one [fol. 20] certain first mortgage bond of said Theodore Griess with interest coupons attached, bearing even date with these presents. After maturity said bond draws interest at the rate of ten per cent per annum; likewise each coupon after its maturity.

If said taxes and assessments are not paid when due, or if the buildings on said premises are not insured as above provided, or if any of said interest is not paid when due, then said whole debt shall become due immediately, at the option of the Trust Company, and shall thereafter draw interest at the rate of ten per cent per annum.

Whether said debt becomes due by lapse of time, or by reason of the failure of the party of the first part to comply with any condition herein, the said The First Trust Company of Lincoln, Nebraska, its successors and assigns, shall have the right to begin the foreclosure of this mortgage at once on the whole debt hereby secured, and to include

therein all taxes, assessments, and insurance premiums paid by it or them.

After the commencement of any suit in foreclosure the plaintiff therein shall be entitled to the possession of said premises and the appointment of a receiver therefor notwithstanding they may be the homestead of the occupant.

Signed this 22nd day of September, A. D. 1924.

Theodor Griess.

In the presence of Elsie Korgan.

[fol. 21] State of Nebraska,
County of Clay, ss:

On this 24th day of September, 1924, before me the undersigned, a notary public in and for said county, personally came Theodor Griess, a widower, to me known to be the identical person described in and whose name is signed to the above deed as grantor and acknowledged said instrument to be his voluntary act and deed.

Witness my hand and notarial seal.

Elsie Korgan, Notary Public. My commission expires on the 21st day of March, 1927. (Notarial Seal.)

[File endorsement omitted.]

[fol. 22] In District Court of Hamilton County

[Title omitted]

Amendment to Amended Petition—Filed Dec. 12, 1925

The plaintiff herewith files this amendment to his amended petition, the same to be paragraphs 18, 19 and 20 of said petition and to be inserted just before the prayer.

18. That through a long period of time Theodore Griess, defendant herein, has been an agent of the First Trust Company of Lincoln, Nebraska, in Clay County, Nebraska, and has made numerous loans for said First Trust Company of Lincoln, Nebraska, as its agent and the defendant Theodore Griess having full knowledge of all the facts and

circumstances set out in the amended petition and having full knowledge that said deeds by said Christian Knudson to said McGrew and said Brown were given without consideration and by reason of the undue influence and overpersuasion exerted upon said Knudson, the said First Trust Company of Lincoln, Nebraska, was charged with knowledge of the same facts at the time it made its loans against said real estate.

19. That on November 20, 1923, at 8:10 A. M. there was entered for record in the numerical index and in Book 8 of the Miscellaneous records of Hamilton County, Nebraska, on page 28 by the County Clerk of said County a certain sworn affidavit executed by A. L. Undeland, Attorney in Fact for the defendant Mari Tollofson Todak, alleging that she was and is the widow of the late Christian Knudson, sometimes known as Christian Engen, and that she claimed an interest in the South Half of the Northwest Quarter and North Half of the Southwest Quarter of Section 35, Township 9, Range 7, West of the 6th P. M. in Hamilton County, Nebraska, and that said real estate was the homestead of the deceased and occupied as such up to the time of his death and that the deeds described in plaintiff's amended petition were executed by the deceased as [fol. 23] described therein on the 17th day of July, 1923, and that they were without the knowledge, consent or authority of said widow of said deceased, and therefore under the law of Nebraska utterly void; that the mortgages herein described to the First Trust Company of Lincoln, Nebraska, as grantees were not executed nor filed until September 22, 1924, and the said First Trust Company was at the time it made said loans and accepted said mortgages fully advised as to the facts set out in Plaintiff's amended petition and said First Trust Company conspired with and assisted the other defendants in attempting to cheat and defraud this plaintiff as described in said amended petition.

20. That plaintiff has no plain adequate remedy at law.
Hainer, Craft, Edgerton & Fraizer, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 24] In District Court of Hamilton County

[Title omitted]

Answer and Cross-Petition of First C S. of Lincoln—Filed Mar. 20, 1926

I

Comes now the defendant, the First Trust Company of Lincoln, Nebraska, and for answer to the amended petition of plaintiff herein, while still objecting that the amended petition does not contain allegations sufficient to constitute a cause of action against this defendant and that the same does not disclose any title or right on the part of the plaintiff to maintain this action, admits, alleges and denies as follows:

1. Admits the execution and delivery and recording of the deeds copies of which were attached to said petition, and admits execution and delivery and recording of the deeds and mortages described in paragraph 14 of said petition, but defendant expressly denies the allegations regarding the manner or method or means used in the execution of the deeds or the inducements therefor as alleged in said amended petition.

2. Defendant admits that Leroy A. Megrue and Bertha M. Megrue are husband and wife; that Robert E. Brown and Anna S. Brown are husband and wife and that said Bertha M. Megrue and Anna S. Brown were nieces of Christian Knudson; admit that Christian Knudson was sometimes known as Christian Engen and that he departed this life in the month of August, 1923, intestate; admit that the defendant H. G. Thomas is the administrator of the estate of said Christian Knudson, otherwise known as Christian Engen and that said estate is now pending probate in the County Court of Hamilton County, Nebraska, that being the court having original and ex*lucisv*e jurisdiction of all matters in said estate relative to the determination of heirship, the descent and distribution of the property and estate of said Christian Knudson, deceased.

[fol. 25] 3. The defendant alleges that the plaintiff was fully informed and well acquainted with the facts, circum-

stances and transactions had by and between the said Christian Knudson or Christian Engen with the said defendants and with each and all the details regarding the conveyances, deeds and mortages relative to the real estate mentioned in said amended petition, and with full knowledge and information the said plaintiff Knute C. Engen thereafter confirmed the same by making, acknowledging and delivering to the defendants Brown and Megrue a quit claim deed to said premises thereby conveying to said Brown and Megrue and to the grantees and assignees thereof, all his right, title and interest in and to said land described in said deed, which deed was filed for record in the office of the County Clerk of Hamilton County, Nebraska, and recorded in Book 31 of Deeds at page 491 of the Deed Records of Hamilton County, Nebraska, on March 12, 1926. That at the time of the filing of this action plaintiff did not own or hold any right, title or interest in or to said premises; that a copy of said quit claim deed hereto attached, marked Exhibit "A", is made a part of this answer.

4. Defendant denies each and every allegation of said petition not herein expressly admitted or denied.

5. Defendant specifically denies the allegations of paragraph 18 and alleges that Theodore Griess was never the agent of the defendant and that in regard to the mortgages referred to in the cross-petition of this defendant, said Theodore Griess was not acting as agent of defendant but on his own behalf.

6. Defendant admits that the affidavit referred to in paragraph 19 was filed as therein alleged and denies the remainder of said paragraph; alleges that at the time said mortgages were made abstract of title, duly certified to date by a bonded abstractor, were furnished to the examining attorney for defendant and showed a merchantable fee title in the mortgagor and that defendant had no knowledge of any alleged defect in said title and acted in good faith in the making of said mortgage.

II

For further answer to said amended petition and by way of cross-petition against its co-defendants and against the plaintiff, defendant alleges:

1. That this defendant is and at all times herein men- [fol. 26] tioned was a corporation organized and existing under the laws of the State of Nebraska.

2. That on or about September 22, 1924, for value received, said Theodore Griess executed and delivered his promissory note, by the terms of which, he promised to pay to the order of this defendant, on October 1, 1929 the sum of $5000, with interest at 5½% per annum, payable semi-annually.

That a copy of said note is hereto attached, marked Exhibit "B" and made a part of this answer and cross-petition.

3. That as a part of the same transaction and to secure the payment of said note, said Theodore Griess on September 22, 1924, executed and delivered his mortgage deed conveying to this defendant, the South Half of Northwest Quarter (S. ½ N. W. ¼) of Section 35, Township 9, Range 7, Hamilton County, Nebraska, which mortgage was on September 25, 1925, recorded in the office of register of deeds of Hamilton County, Nebraska, and now appears of record in Book 78 at page 270.

That no part of said note and mortgage has been paid except interest due prior to October 1, 1925.

4. That at the time said mortgage was made an abstract of title duly certified to date by a bonded abstractor, was furnished to the examining attorney for this defendant and showed a merchantable fee title in the mortgagor, and defendant had no knowledge of any alleged defect in the title and paid over to the defendant Theodore Griess, on or about September 26, 1924 the sum of $5000.00 in reliance on said title and the possession of said land in said Theodore Griess. That said defendant paid out said money, as aforesaid, in reliance upon said mortage being a first lien and without any notice or knowledge of any claim that plaintiff is now making or that plaintiff had any claim to any portion of said premises; that the first notice or knowledge this defendant had of plaintiff's claim was received on reading the petition at the commencement of this action. That shortly after the recording of said mortgage and months prior to the commencement of this action, this defendant in good faith, sold, endorsed and delivered the

notes secured by said mortgage and said mortgage, to purchasers, who now hold the same and who have had no notice or knowledge of any claim right, title or interest in the plaintiff.

[fol. 27] 5. That the claim of the plaintiff and the right, title and interest of all of the defendants herein is subject and inferior to the first lien of this defendant.

Wherefore defendant prays that the mortgage recorded in Book 78 at page 270 be adjudged and declared to be a first lien upon the South Half of Northwest Quarter (S. ½ N. W. ¼) of said Section 35, Township 9, Range 7, Hamilton County, Nebraska, and that the claim of the plaintiff and of all of said defendants be adjudged and declared to be subject and inferior to said lien and that the defendant have and recover its costs herein.

III

For further answer and by way of cross-petition against its co-defendants and the plaintiff, defendant alleges:

1. That it is and at all times herein mentioned, was a corporation organized and existing under the laws of the State of Nebraska.

2. That on or about September 22, 1924, for value received, said Theodore Griess, executed and delivered his promissory note, by the terms of which, he promised to pay to the order of this defendant, on October 1, 1929, the sum of $4,500 with interest at 5½% per annum, payable semi-annually.

That Exhibit "C" hereto attached is a true copy of said note except as to amount and description of property.

3. That as a part of the same transaction and to secure the payment of said note, said Theodore Griess on September 22, 1924, executed and delivered his mortgage deed conveying to this defendant, the North Half of Southwest Quarter (N. ½ S. W. ¼) of Section 35, Township 9, Range 7, Hamilton County, Nebraska, which mortgage was on September 25, 1924, recorded in the office of the register of deeds of Hamilton County, Nebraska, and now appears of record in book 78 at page 286.

That no part of said note and mortgage has been paid except interest due prior to October 1, 1925.

4. That at the time said mortgage was made an abstract of title, duly certified to date by a bonded abstractor, was furnished to the examining attorney for this defendant and showed a merchantable fee title in the mortgagor, and defendant had no knowledge of any alleged defect in the title and paid over to the defendant Theodore Griess, on [fol. 28] or about September 26, 1924, the sum of $5,000 in reliance on said title and the possession of said land in said Theodore Griess. That said defendant paid out said money, as aforesaid, in reliance upon said mortgage being a first lien and without any notice or knowledge of any claim that plaintiff is now making or that plaintiff had any claim to any portion of said premises; that the first notice or knowledge this defendant had of plaintiff's claim was received on reading the petition at the commencement of this action. That shortly after the recording of said mortgage and months prior to the commencement of this action, this defendant in good faith, sold, endorsed and transferred the notes secured by said mortgage and said mortgage, to purchasers, who now hold the same and who have and had no notice or knowledge of any claim right, title or interest in the plaintiff.

6. That the claim of the plaintiff and the right, title and interest of all of the defendants herein is subject and inferior to the first lien of this defendant.

Wherefore defendant prays that the mortgage recorded in Book 78 at page 286, be adjudged and declared to be a first lien upon the North Half of the Southwest Quarter (N. ½ S. W. ¼) of said Section 35, Township 9, Range 7, Hamilton County, Nebraska, and that the claim of the plaintiff and of all of said defendants be adjudged and declared to be subject and inferior to said lien and that the defendant have and recover its costs herein.

The First Trust Company of Lincoln, Nebraska, Defendant and Cross-petitioner. Hall, Cline & Williams, Attorneys.

Duly sworn to by F. D. Williams. Jurat omitted in printing.

[fol. 29] EXHIBIT "A" TO ANSWER AND CROSS-PETITION

The grantor, Knute C. Engen, for the consideration of One Dollar and other valuable considerations, — Dollars, convey- and quitclaim- to Robert E. Brown and Anna S. Brown and L. A. Megrue and Bertha Megrue all interest in the following described real estate: The S. ½ N. W. ¼ and the N. ½ S. W. ¼ of Section Thirty-five (35), Township Nine (9), Range Seven (7), West of the Sixth P. M., Hamilton County, Nebraska, situate in the County of Hamilton, State of Nebraska.

Dated this 12th day of January, 1924.

(Signed) Knute C. Engen.

Witnesses: Thrond P. Bugge, Andrew Mae.

STATE OF WASHINGTON,
County of King, ss:

I, Thrond P. Bugge, a Notary Public, do hereby certify that on this 12th day of January, 1924, personally appeared before me Knote C. Engen to me known to be the individual described in, and who executed the within instrument, and acknowledged that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal this 12th day of January, A. D. 1924.

Thrond P. Bugge, Notary Public in and for the State of Washington, residing in Seattle. (Seal.)

(Filed March 12, 1926, in Volume 31, page 491, of Records of Hamilton County, Nebraska.)

[File endorsement omitted.]

[fol. 30] IN DISTRICT COURT OF HAMILTON COUNTY

[Title omitted]

ANSWER OF BANK OF HARVARD ET AL.—Filed Mar. 5, 1926

Come now the defendants, Union State Bank of Harvard, Nebraska, a corporation, LeRoy Megrue, Bertha M. Megrue,

Robert E. Brown, Anna S. Brown, H. G. Thomas, Administrator of the estate of Christian Knudsen deceased, Theodore Griess and for their several answers herein, (while still objecting that the amended petition herein does not contain allegations sufficient to constitute a cause of action against these answering defendants, or any of them and that same does not disclose any title or right on the part of the plaintiff to maintain this action in this Court,) allege as follows, towit:

1. Admit that LeRoy A. Megrue and Bertha M. Megrue are husband and wife; that Robert E. Brown and Anna S. Brown are husband and wife, and that said Bertha M. Megrue and Anna S. Brown were nieces of Christian Knudson; admit that Christian Knudson was sometimes known as Christian Engen and that he departed this life in the month of August, 1923, intestate; admit that the defendant H. G. Thomas is the administrator of the estate of said Christian Knudson, otherwise known as Christian Engen and that said estate is now pending probate in the County Court of Hamilton County, Nebraska, that being the court having original and exclusive jurisdiction of all matters in said estate relative to the determination of heirship, the descent and distribution of the property and estate of said Christian Knudson, deceased.

2. These defendants admit the execution, delivery and recording of the various deeds, mortgages and conveyances [fol. 31] that are referred to in the amended, amended petition of the plaintiff, and admit the execution and delivery and recording of the deeds and mortgages described in paragraph 14 of said petition, but the defendants expressly deny the allegations regarding the manner or method or means used in the execution of the deeds or the inducements therefore as alleged in said amended, amended petition, and allege the facts to be that each and all of said deeds, mortgages and conveyances were made in due course for valuable consideration and in good faith.

3. Further answering these defendants deny each and every allegation contained in said amended, amended petition not herein expressly admitted.

4. These defendants allege that the plaintiff was fully informed and well acquainted with the facts, circumstances and transactions had by and between these answering defendants and said Christian Knudson or Christian Engen, and with each, and other details as to conveyances, deeds, mortgages and conveyances relative to the real estate mentioned and described in his petition, and that with full knowledge and information the said plaintiff, Knute C. Engen, afterward, approved, ratified and confirmed the same by making, acknowledging and delivering to the defendants Brown and Megrue a good and sufficient quit claim deed to said premises and thereby conveyed to said Browns and Megrues and to their grantees and assignees all his right, title and interest in and to each and every part, parcel and tract of the lands described in his amended, amended petition on or about January 12, 1924, which said deed was filed for record in the office of the County Clerk of Hamilton County, Neb. and recorded in Book 31 of deeds at page 491 of the Deed Records of Hamilton County, Nebraska, on March 12th, 1926. That at the time of the filing of this Action the plaintiff, Knute C. Engen, did not own or hold any right, title, interest or share in and to said premises, but had parted with all his right and claim thereto, if any he ever had. A copy of said Deed of Quit Claim is hereto attached marked Exhibit "A" and made a part of this Answer as fully as though the same were extended and set forth at length herein. These defendants allege that by reason of the premises and by reason of the execution and delivery of said Quit Claim Deed, the plaintiff Knute C. Engen became and is now estopped to question the validity of the title of the defendants or any of them and that he is further estopped thereby from claiming or asserting any [fol. 32] right, title or interest in and to said premises or any part thereof.

Wherefore these answering defendants pray that the plaintiff take nothing by his amended *amended* petition herein filed and that same be dismissed at the cost of the plaintiff and that the title, possession and dominion of the defendant, the Union State Bank of Harvard, Nebraska, a corporation, be quieted, confirmed and approved as the same now appears of record and subject only to the lawful mort-

gages, liens and incumbrances existing thereon, as the various rights, interests and liens of these defendants may appear and that the plaintiff be forever enjoined from molesting, disturbing or interfering with the defendants in the quiet enjoyment and peaceable possession of said premises and each and every part thereof; that the defendants recover their costs herein expended and for such other, further or different relief as may be just and equitable in the premises.

Dated this 25th day of March, 1926.

J. H. Grosvenor, Atty. for Above Answering Defendants.

Duly sworn to by J. H. Grosvenor. Jurat omitted in printing.

[fol. 33] EXHIBIT "A" TO ANSWER

The grantor, Knute C. Engen, for the consideration of One Dollar and other valuable considerations *Dollars*, convey- and quitclaim- to Robert E. Brown and Anna S. Brown and L. A. Megrue and Bertha Megrue all interest in the following described real estate: The S.½ N. W.¼ and the N. ½ S. W. ¼ of Section Thirty-five (35), Township Nine (9), Range Seven (7), West of the Sixth P. M., Hamilton County, Nebraska, situate in the County of Hamilton, State of Nebraska.

Dated this 12th day of January, 1924.

(Signed) Knute C. Engen.

Witnesses: Thrond P. Bugge, Andrew Mae.

STATE OF WASHINGTON,
County of King, ss:

I, Thrond P. Bugge, a Notary Public, do hereby certify that on this 12th day of January, 1924, personally appeared before me Knute C. Engen, to me known to be the individual described in, and who executed the within instrument, and acknowledged that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal this 12th day of January, A. D. 1924.

Thrond P. Bugge, Notary Public in and for the State of Washington, residing at Seattle. (Seal.)

(Filed March 12, 1926, in Volume 31, page 491, of Records of Hamilton County, Nebraska.)

[fol. 34] In District Court of Hamilton County

[Title omitted]

Amended Reply—Filed May 3, 1926

Comes now the plaintiff and for his amended reply to the several answers of defendants denies each and every material allegation therein contained, save and except those specifically admitted in plaintiff's petition.

Further replying, this plaintiff alleges that on the 12th day of January, 1924, the defendant H. G. Thomas and the defendant Robert E. Brown came to Seattle, Washington, and endeavored to secure the signature of this plaintiff to a contract and agreement, a copy of which is attached hereto and identified as Exhibit "A" and made a part of this reply, and the defendant H. G. Thomas as Administrator of the estate of Christian Knudson declared that he had some funds of said estate in his possession which would be turned over to this plaintiff if he would sign this contract, but that if plaintiff did not sign said contract, Exhibit "A," then the said H. G. Thomas as Administrator of said estate would keep this plaintiff from said funds, which were legally his, as long as the law would let him; that plaintiff finally agreed to sign said contract and thereupon the defendants Brown and Thomas falsely, fraudulently, deceitfully and dishonestly did substitute in place of said contract, Exhibit "A," for this plaintiff's signature, and without the knowledge of this plaintiff, a certain quit claim deed of plaintiff's title and interest in and to the South Half of the Northwest Quarter and the North Half of the Southwest Quarter of Section 35, Township 9, North, Range 7, West of the 6th P. M. in Hamilton County, Nebraska, and

did by this fraud, deception and trickery deceive this plaintiff into signing and executing said quit claim deed; that plaintiff signed said quit claim deed without consideration and fully believed that he was signing the contract, a copy of which is shown herein as Exhibit "A," and plaintiff did not discover said deceit, fraud and trick on the part of said defendants Brown and Thomas until they procured the recording of said deed on the 12th day of March, 1926; that after plaintiff had signed an instrument, which plaintiff supposed was the contract shown herein as Exhibit "A," [fol. 35] on the 12th day of January, 1924, plaintiff demanded from said H. G. Thomas and received from him a copy of said contract, which plaintiff supposed he had signed, and the copy so delivered to said plaintiff by H. G. Thomas is the same as Exhibit "A" herein.

That this plaintiff at no time confirmed the making, acknowledging and delivering of the original deeds to the defendants Brown and Megrue and said quit claim deed as placed for record by the defendants is a fraud and a cheat and utterly void and of no force and effect by reason of said fraud.

Wherefore Plaintiff renews the prayer of his amended petition and in addition thereto prays that the court shall hold as null and void the quit claim deed recorded by the defendants on March 12, 1926, and found in Volumns 31, page 491, of the records of Hamilton County, Nebraska, for the reasons set out in this reply.

Craft, Edgerton & Fraizer, Attorneys for Plaintiff.

Duly sworn to by Knute C. Engen. Jurat omitted in printing.

EXHIBIT "A" TO AMENDED REPLY

This agreement, made and entered into this 12th day of January, A. D. one thousand nine hundred and twenty-four, by and between R. E. Brown, the party of the first part, and Knute C. Engen, the party of the second part,

Witnesseth: That the party of the first part in consideration of the covenants and agreements hereinafter made by the party of the second part hereby covenant that the party of the first part will pay the party of the second part the

sum of Four Thousand ($4,000.00) when the S. ½ N. W. ¼ [fol. 36] 35-9-7 is sold for $12,000, or when party of the first part is able to sell his Hamilton County Nebraska land at a price sufficient in excess of the mortgage now against it to bring enough to make settlement as stated.

In Witness Whereof the said parties have hereunto set their hands and seals, the day and year first above written.

Signed, sealed and delivered in presence of Thrond P. Bugge, Andrew Moe.

R. E. Brown, Knute C. Engen.

[File endorsement omitted.]

[fol. 37] In District Court of Hamilton County

[Title omitted]

Answer and Cross-petition of M. F. Todok—Filed May 3, 1926

Comes now the defendant Mari Tollefsen Todok, and for her answer to the amended petition of the plaintiff herein admits Sections 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 17, thereof, and admits that by reason of the unlawful conspiracy and the undue influence exerted by LeRoy A. Megrue, Bertha M. Megrue, his wife, Robert E. Brown and Anna S. Brown, his wife, H. G. Thomas, Theodore Griess, defendants herein, over said Christian Knudson, Deceased, plaintiff has been cheated and defrauded out of the one-half undivided interest in the lands described in plaintiff's petition of the value of $24,000.00, but this defendant specifically denies that the plaintiff is the sole and only heir of said Christian Knudson, deceased, and this defendant denies each and every other allegation contained in the plaintiff's amended petition, except such as are hereinafter or hereinbefore expressly admitted, qualified or explained; and this defendant denies each and every allegation contained in the answer and cross-petition of the defendant First Trust Company of Lincoln, Nebraska, and in the answer of the Union State Bank of Harvard, Nebraska, LeRoy A. Megrue, Bertha M. Megrue, Robert E. Brown, Anna S. Brown, H. G. Thomas, Administrator, and Theo-

dore Griess, except such allegations as admit the truth of this defendant's answer and cross-petition, and except such allegations as are hereinbefore or hereinafter expressly admitted to be true, qualified or explained.

Cross-petition

1. This defendant alleges that she and Christian Knudson, deceased, were married in Norway on December 7, 1867, and that the plaintiff herein is the son of this answering de- [fol. 38] fendant and said Knudson, and that the said deceased, Christen Knudsen, or Christian Knudsen, or Christian Knudson, or Christen Engen, or Christen Knudsen Engen, is the same party referred to in plaintiff's amended petition as Christian Knudson, now deceased. This defendant further alleges that her husband died intestate at Hamilton County, Nebraska, on August 6, 1923, which place has been the legal residence of this answering defendant, and that the land described in the plaintiff's amended petition has been for many years, and was at the time of the death of this defendant's husband, the homestead of said Deceased and his wife.

2. This answering defendant further alleges that by an order of the County Court of Hamilton County, Nebraska, the only property found in the name of the said Deceased following his death has been distributed, or the greater part thereof, equally between the Deceased's son and this defendant, the widow of said Deceased.

3. Defendant further alleges that all of the deeds and mortgages mentioned in the plaintiff's amended petition were executed and delivered with full, actual and constructive knowledge by each and all of the parties thereto that this answering defendant had an interest in said real estate as the wife of said deceased, and with full knowledge that said real estate was the homestead of deceased and this defendant at all times during the last ten years and more of the lifetime of said Deceased.

4. Defendant further alleges that at the time said Deceased was induced to execute and deliver said deeds the value of said real estate was the sum of $24,000.00, and that the said Union State Bank of Harvard, through its

officers, caused said deeds to be executed and delivered by said deceased for their benefit, and the benefit received by the said bank and its officers as the result of the alleged conspiracy was the sum of $9,600 and $8,000.00, as stated in paragraphs 7 and 8 of the plaintiff's amended petition, or a total of $17,600.00, which sum of money, in truth and in fact, upon the death of said deceased, became due and payable to H. G. Thomas, Administrator of the Estate of said Deceased, and should have been paid by said defendant Bank and its officers to said Administrator instead of being retained by the defendant bank and its officers as the result of crediting the worthless notes of the said Brown and Megrue with said amount. This defendant further alleges [fol. 39] that the deceased never intended to and had no knowledge of executing the deeds in question to the said defendants Brown and Megrue, and that if not for the benefit which the defendant Bank and its said officers expected to receive and did receive as a result of the execution of said deeds, the deeds would never have been made or executed.

5. The defendant further alleges that when the said defendant H. G. Thomas was appointed administrator of the estate of said Deceased, it was part of his duty as such administrator to collect and receive for said estate the actual consideration which the defendant bank paid for the title to said real estate, which was the sum of $17,600.00, and that by the failure of said administrator to collect said sum of money this defendant has been damaged in the sum of one-half of said amount, or the sum of $8,800.00, which sum she would have received had it been collected by said administrator.

Wherefore Mari Tollefsen Todok, this answering defendant, prays that the deeds alleged to have been made by Christian Knudsen on July 17, 1923, and all deed, mortgages & conveyances issued since said date envolving the real estate in question in this law suit be cancelled & set aside or that this defendant decreed to be the owner of a ½ undivided interest therein that all of said deeds & mtgs. involving same since July 16, 1923, be cancelled, or have judgment against the Union State Bank or Harvard, Nebraska, Leroy A. Megrue, Bertha M. Megrue, his wife,

Robert E. Brown, and Anna S. Brown, his wife, and H. G. Thomas, personally and H. G. Thomas, Administrator of the estate of Christian Knudsen, deceased, Theodore Griess and the First Trust Company of Lincoln, Nebraska, for the sum of $8,800.00 together with interest thereon from the — day of October, 1923, at the rate of 7% per annum, and the costs of this action; or in the event the judgment in this case be allowed the plaintiff, that this defendant have judgment over and against said plaintiff for one-half of the amount said plaintiff recovers.

Brown, Baxter, Van Dusen & Ryan, Attorneys for Defendant.

Duly sworn to by Rody Ryan. Jurat omitted in printing.

[fol. 40] [File endorsement omitted.]

[fol. 41] In District Court of Hamilton County

[Title omitted]

Reply to Answer and Answer to Cross-petition of Mari Tollefsen Todok—Filed Oct. 21, 1926

Comes now the plaintiff and for reply to the answer and for answer to the cross-petition of Mari Tollefsen Todok admits that the said defendant and cross-petitioner was the wife of Christian Knudson and the mother of this plaintiff and that the real estate described in plaintiff's petition was the homestead of deceased Christian Knudson, but denies that said Mari Tollefsen Todak is entitled to inherit any of the real estate of her deceased husband Christian Knudson for the reason she is an alien and is not entitled to inherit real estate in Nebraska by reason of no treaty between the United States and Norway.

Further answering the cross-petition of said Mari Tollefsen Todak this plaintiff alleges that this action is for the quieting of title in said real estate and is not an action for conversion of the proceeds received for said real estate by the defendant Union State Bank or others and this plaintiff denies that the said Mari Tollefsen Todak is entitled to

any share in said real estate for the reasons already set out herein.

Further answering plaintiff denies each and every material allegation in cross-petitioner's answer or cross-petition not specifically admitted in this reply and answer and in plaintiff's petition.

Craft, Edgerton & Fraizer, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 42] In District Court of Hamilton County

[Title omitted]

Answer of Bank of Harvard et al. to Cross-petition of Mari Tollefsen Todok—Filed Nov. 29, 1926

Come now the defendants, Union State Bank of Harvard, Nebraska, a corporation; Robert E. Brown and Anna S. Brown, his wife; H. G. Thomas, Administrator of the Estate of Christian Knudsen, deceased, and Theodore Griess, and for answer to the cross-petition of Mari Tollefsen Todok allege as follows, towit:

1. Deny each and every allegation contained in said cross-petition save and except such as constitute admissions of the allegations contained in the answer filed herein by these defendants.

2. Deny that said Mari Tollefsen Todok has any right, title, or interest, in and to any of the real estate of Christian Knudsen, Deceased, and denies that she is entitled to inherit and take any of said real estate as an inheritance in the State of Nebraska for the reason that she, the said Mari Tollefsen Todok, is an alien subject of the Kingdom of Norway and is not entitled to take and hold real estate in the State of Nebraska for the reason that no treaty exists between the United States of America, and the Kingdom of Norway whereby alien subjects of the Kingdom of Norway are permitted to acquire title by inheritance to real estate in the State of Nebraska.

3. That in the decree determining heirship made and entered by the County Court of Hamilton County, Nebraska, on October 21, 1926, in the matter of the estate of Christian Knudsen, deceased, the said Mary Tollefsen Todok was expressly excluded from inheriting any right, title, or interest in or to any real estate of said Christian Knudsen, deceased; that said Mari Tollefsen Todok has not appealed from said decree determining heirship and that the time for appeal on her part has expired.

4. That said Mari Tollefsen Todok was never a resident, inhabitant nor subject of the United States of America and never lived in the United States of America, and never was within the United States of America in her lifetime, and if now living is a resident, inhabitant and subject of the [fol. 43] Kingdom of Norway and never was and is not now eligible to acquire title by inheritance or otherwise to lands and real estate situated within the State of Nebraska in the United States of America.

Wherefore these answering defendants pray that the defendant Mari Tollefsen Todok take nothing by her cross-petition herein, but same be dismissed at her cost.

J. H. Grosvenor, Attorney for Above-named Answering Defendants.

Duly sworn to by Theodore Griess. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 44] In District Court of Hamilton County

[Title omitted]

Answer of the First Trust Company of Lincoln, Nebraska, to Petition of Intervention of Mari Tollefsen Todok—Filed Nov. 29, 1926

Comes now the defendant, The First Trust Company of Lincoln, Nebraska, and for answer to the petition of intervention of cross-petition of Mari Tollefsen Todok, says:

1. Denies each and every allegation contained in said cross-petition, save and except such as constitute admissions of the allegations contained in the answer and cross-petition filed herein by this defendant.

2. Denies that said Mari Tollefsen Todok has any right, title or interest, in and to any of the real estate of Christian Knudsen, deceased, and denies that she is entitled to inherit and take any of said real estate as an inheritance in the State of Nebraska, for the reason that she, is an alien subject of the Kingdom of Norway and is not entitled to take and hold real estate in the State of Nebraska, for the reason that no treaty exists between the United States of America and the Kingdom of Norway whereby alien subjects of the Kingdom of Norway are permitted to acquire title by inheritance to real estate in the State of Nebraska.

3. That in the decree determining heirship made and entered by the County Court of Hamilton County, Nebraska, on October 21, 1926, in the matter of the estate of Christian Knudsen, deceased, the said Mari Tollefsen Todok was especially excluded from inheriting any right, title or interest in or to any real estate of said Christian Knudsen, deceased; that said Mari Tollefsen Todok has not appealed from said decree determining heirship and that the time for appeal on her part has expired.

4. That said Mari Tollefsen Todok was never a resident, inhabitant nor subject of the United States of America and never lived in the United States of America, and never was within the United States of America in her lifetime, and if now living is a resident, inhabitant and subject of the Kingdom of Norway and never was and is not now eligible to acquire title by inheritance or otherwise to lands [fol. 45] and real estate situated within the State of Nebraska in the United States of America.

II

For further answer and by way of cross-petition to the said petition of Mari Tollefsen Todok, this defendant alleges:

1. That this defendant is and at all times herein mentioned was a corporation organized and existing under the laws of the State of Nebraska.

2. That on or about September 22, 1924, for value received, Theodore Griess made, executed, acknowledged and delivered to this defendant the notes and mortgages more particularly described in the answer and cross-petition of this defendant to the amended petition of the plaintiff herein, all of which allegations and exhibits in said cross-petition are hereby referred to and made a part of this cross-petition.

3. That this defendant accepted said mortgages in good faith, paid full value therefor as alleged, and is a bona fide — of said mortgagee.

Wherefore defendant prays that the claim of Mari Tollefsen Todok may be dismissed, and that the mortgages recorded in Book 78, page 270, and, in Book 78, page 286, be adjudged and declared to be first liens on the real estate therein described, and that defendant have and recover its costs herein.

The First Trust Company of Lincoln, Nebraska, Defendant, by Hall, Cline & Williams, Its Attorneys.

Duly sworn to by F. D. Williams. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 46] In District Court of Hamilton County

[Title omitted]

Reply of Mari Tollefsen Todak to the Answer of First Trust Co. of Lincoln et al.—Filed Dec. 1, 1926

Comes now the defendant Mari Tollifsen Todak and for her reply to the answer of the defendant First Trust Company of Lincoln, Nebraska, and Union State Bank of Harvard, Nebraska, a corporation, Robert E. Brown and Anna S. Brown, his wife, H. G. Thomas, Administrator of the Estate of Christian Knudson, deceased, and Theodore Griess denies each and every allegation contained in said answers except which admit the truth of this defendant's

answer and cross-petition and further excepting such allegations of said answers as are hereinafter expressly admitted, qualified and explained.

This defendant Mari Tollifsen Todak alleges that her deceased husband Christian Knudson acquired title to the lands involved in this law suit and took possession thereof prior to March 16, 1889, and remained in possession thereof until his death August 6, 1923, and at the time he so acquired title and took possession thereof, he was a resident of Nebraska and he never thereafter became a citizen of the United States and was not a citizen of the United States at the time of his death.

This defendant further alleges that in the absence of any treaty between the United States and Norway she is entitled to inherit real estate of her deceased husband which was acquired by him prior to the passage of Section 5687 of the Compiled Statutes of Nebraska, 1922, which act was approved March 16, 1889, but that this defendant also alleges that by virtue of the treaty between the United States and Norway of the 3rd day of April, 1783 (Article 6), and the treaty between the United States and Norway dated the 4th day of July, 1887, proclaimed Jan. 19, 1828 (Article 17), which treaty is still in force and effect between Norway and the United States, she is entitled to inherit real estate of her deceased husband, although this defendant never took up her actual residence within the State of Nebraska [fol. 47] by coming to Nebraska to live with her husband.

This defendant alleges that the County Court of Hamilton County, Nebraska, in its order of October 21, 1926, in the estate of Christian Knudson, deceased, was without jurisdiction to determinate the rights of this defendant in the real estate involved in this suit and that part of the order of said court purporting to determine the interest of this defendant in the real estate involved in this suit is void.

Defendant further alleges that on or about the years 1886 and 1888, at which time the title to this land involved in this law suit was acquired by Christian Knudson, deceased, that this defendant was then, as the wife of said Knudson, although at that time residing in Norway, and has been at all times since and is now entitled to inherit her interest in said real estate or to hold the legal title thereto and has

at all times since the acquisition of said land by the deceased had and maintained and still has her homestead right and interest in said real estate by reason of her marriage to said Knudson and of the further fact that this defendant has never intended to have or has never claimed a legal residence other than that of her husband.

That this defendant has never had any property other than her interest in her husband's and she has at all times been solely dependent upon deceased for her support.

Wherefore this defendant prays that the deeds described in the plaintiff's amended petition alleged to have been signed by deceased on July 17, 1923, and all subsequent deeds, mortgages and conveyances involving real estate in question in this suit be cancelled and set aside or that this defendant have judgment against each and all other defendants herein in the sum of $8800.00 together with interest thereon at the rate of seven per cent per annum as prayed in defendant's answer and cross-petition herein and for such other and further relief as may seem to the Court just and equitable.

Rody Ryan, Attorney for Mari Tollifsen Todak, defendant.

[fol. 48] *Duly sworn to by Rody Ryan. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 49] In District Court of Hamilton County

Knute C. Engen, Plaintiff,

vs.

Union State Bank of Harvard, Nebraska, a Corporation; LeRoy A. Megrue and Bertha M. Megrue, His Wife; Robert E. Brown and Anna S. Brown, his wife, and H. G. Thomas, Administrator of the Estate of Christian Knudson, Deceased; Theodore Griess and First Trust Company of Lincoln, Nebraska, and Mari Tollefsen Todok, Defendants

Decree—Filed July 19, 1927

Now on this 19th day of July, 1927, the same being one of the days of the regular April term of the District Court

of Hamilton County, Nebraska, this cause came on for decision upon the amended petition of the plaintiff, the answers of the defendants and the cross-petition of the defendant Mari Tollefsen Todok and the answer and reply thereto, and the evidence, and the Court having carefully considered the pleadings and the evidence and having heard the argument of counsel for the various litigants herein, finds for the plaintiff Knute C. Engen and the defendant Mari Tollefsen Todok, finding that each is entitled to an undivided one-half interest in the real estate involved herein and described hereinafter.

The Court specially finds as follows:

1. That Christian Knudson, sometimes known as Christian Engen, they being one and the same person, was an alien, a citizen of Norway, having never completed his naturalization in the United States, and the defendant and cross-petitioner, Mari Tollefsen Todok, was his legal wife and was living in Norway at the time of his death.

2. That Christian Knudson settled in Nebraska in 1887 and established a homestead upon the North Half of the Southwest Quarter and the South Half of the Northwest Quarter of Section 35, Township 9, North, Range 7, West of the 6th P. M. in Hamilton County, Nebraska, shortly thereafter, and continued to reside upon said real estate as his homestead until his death, August 6, 1923.

[fol. 50] 3. That the Warranty Deed described in plaintiff's petition alleged to be signed by said Christian Knudson by mark, conveying to LeRoy A. Megrue and Bertha M. Megrue, his wife, the North Half of the Southwest Quarter, Section 35, Township 9, North, Range 7, West of 6th P. M. in Hamilton County, Nebraska, was void and without force and effect for the reason that said land was a part of the homestead of said Christian Knudson and said deed was not signed and acknowledged by his wife, the defendant Mari Tollefsen Todok.

4. That the Warranty Deed signed by said Christian Knudson by mark conveying to Robert E. Brown and Anna S. Brown the South Half of Northwest Quarter of Section 35, Township 9, North, Range 7, West of 6th P. M. in Hamilton County, Nebraska, was void for the same reason.

5. That the deed from LeRoy A. Megrue and Bertha M. Megrue, conveying to the Union State Bank of Harvard, Nebraska, the North Half of the Southwest Quarter of Section 35, and the deed from Robert E. Brown and Anna S. Brown, conveying to the Union State Bank of Harvard, Nebraska, the South Half of the Northwest Quarter of Section 35, all in Township 9, North, Range 7, West of 6th P. M. Hamilton County, Nebraska, are void for the reason that said grantors were without title thereto.

6. That the warranty deed by the defendant Union State Bank of Harvard, Nebraska, conveying all of said real estate to defendant Theodore Griess, and the mortgages given by said defendant Theodore Griess to the defendant First Trust Company of Lincoln, Nebraska, one in the amount of $5000 and one in the amount of $4500 and the further deed by said defendant Theodore Griess of said real estate to the defendant Union State Bank of Harvard, Nebraska, subject to said mortgages, were all null and void and of no force and effect for the reason that none of the grantors therein had title to said real estate.

7. That the quit claim deed from plaintiff Knute C. Engen to the above described real estate conveying same to LeRoy A. Megrue, Bertha M. Megrue, Robert E. Brown and Anna S. Brown, was null and void and of no force and effect for the reason that same was obtained without consideration.

8. That Christian Knudson, on his death, August 6, 1923, died intestate, leaving as his sole and only heirs at law, his wife, the defendant, Mari Tollefsen Todok and his son, the plaintiff, Knute C. Engen, and that said real estate descended to them, half and half, share and share alike.

[fol. 51] To all of which findings the defendants and each of them, except the defendant Mari Tollefsen Tokok, excepts.

9. That there was no fraud, conspiracy or undue influence exercised by the defendants or their agents on the said Christian Knudson as alleged in plaintiff's petition.

To which finding the plaintiff, Knute C. Engen, and the defendant Mari Tollefsen Todok, excepts.

10. That since this action was commenced, the defendant Union State Bank of Harvard, Nebraska, has been found

and declared insolvent and Van E. Peterson appointed by the District Court of Clay County, Nebraska, receiver, and that he should be substituted as defendant for said Union State Bank.

11. That the said Van E. Peterson, receiver of defendant Union State Bank of Harvard, Nebraska, has executed and delivered a deed of said real estate to the Nebraska State Bank of Harvard, Nebraska, which deed has not been filed for record; that the said Nebraska State Bank is now in possession of said premises and should be made a party to this action.

It is, therefore, ordered, adjudged, and decreed by the court that Van E. Peterson, receiver of the Union State Bank of Harvard, Nebraska, be and he hereby is substituted for the defendant Union State Bank of Harvard, Nebraska; that the Nebraska State Bank of Harvard, Nebraska, be and hereby is made a party defendant to this action; that the title to the North Half of the Southwest Quarter and to the South Half of the Northwest Quarter of Section 35, Township 9, north Range 7, West of 6th P. M. in Hamilton County, Nebraska, be and the same hereby is forever quieted in the plaintiff Knute C. Engen and the defendant Mari Tollefsen Todok, as tenants in common, each owning an undivided one-half therein and thereto, and that the Warranty deed to said real estate from Christian Knudson to LeRoy A. Megrue and Bertha M. Megrue, dated July 17, 1923, conveying to said grantees the North Half of Southwest Quarter of Section 35, Township 9, North, Range 7, West 6 P. M., recorded in Book 32, page 20 of the Deed Records of Hamilton County, Nebraska, also the Warranty Deed from Christian Knudson, signed as Christian Engen, to Robert E. Brown and Anna S. Brown, dated July 17, 1923, conveying to said grantees the South Half of the Northwest Quarter of Section 35, Township 9, North, Range 7, West 6 P. M. in Hamilton County, Nebraska, and recorded in book 32 page 22 of the deed records of Hamilton County, [fol. 52] Nebraska, also the Warranty Deed from LeRoy A. Megrue and Bertha M. Megrue, to the Union State Bank of Harvard, Nebraska, conveying the North Half of the Southwest Quarter of Section 35, Township 9, North, Range 7, West of 6th P. M. Hamilton County, Nebraska, dated Oc-

tober 2, 1923, and recorded in book 32, page 21 of the Deed records of Hamilton County, Nebraska, also the warranty deed from Robert E. Brown and Anna S. Brown to the Union State Bank of Harvard, Nebraska, dated September 17, 1923, conveying the South Half of the Northwest Quarter of Section 35, Township 9, North, Range 7, West 6 P. M. in Hamilton County, Nebraska, and recorded in Book 32 page 23, of the deed records of Hamilton County, Nebraska, also the warranty deed from the Union State Bank of Harvard, Nebraska, to Theodore Griess, dated September 5, 1924, conveying the South Half of the Northwest Quarter and the North Half of the Southwest Quarter of said Section 35, Township 9, North, Range 7, West 6th P. M. in Hamilton County, Nebraska, and recorded in Book 31, page 195 of the deed records of Hamilton County, Nebraska, also the mortgage deed of said Theodore Griess to the First Trust Company of Lincoln, Nebraska, dated September 22, 1924, conveying the South Half of the Northwest Quarter of said Section 35, Township 9, North, Range 7, West of 6 P. M. in Hamilton County, Nebraska, for the sum of $5,000.00 and recorded in Book 78 page 270 of the mortgage records of Hamilton County, Nebraska, also the mortgage deed from said Theodore Griess to the First Trust Company of Lincoln, Nebraska, dated September 22, 1924, conveying the North Half of the Southwest Quarter of said Section 35, Township 9, North, Range 7, West 6 P. M. in Hamilton County, Nebraska, in the sum of $4,500. and recorded in Book 78 page 286 of the mortgage records of Hamilton County, Nebraska, also the warranty deed from said Theodore Griess to the said Union State Bank of Harvard, Nebraska, dated September 26, 1924, conveying the South Half of the Northwest Quarter of Section 35, Township 9, North, Range 7, West 6 P. M. and recorded in book 32 page 306, also the deed of said Theodore Griess to the Union State Bank of Harvard, Nebraska, dated September 26, 1924, conveying the North Half of Southwest Quarter of Section 35, Township 9, North West 6th P. M. and recorded in book 32 page 305 of the deed records of Hamilton County, Nebraska, also the quit claim deed from Knute C. Engen to LeRoy A. Megrue, Bertha M. Megrue, Robert E. Brown and Anna S. Brown, conveying the South Half of the Northwest Quarter and North Half of the Southwest

Quarter of Section 35, Township 9, North, Range 7, West 6 P. M. Hamilton County, Nebraska, dated January 12, [fols. 53 & 54] 1924, and recorded in book 31, page 491 of the deed records of Hamilton County, Nebraska, on March 12, 1926, also the unrecorded deed from Van E. Peterson, receiver of the Union State Bank of Harvard, Nebraska, to the defendant Nebraska State Bank of Harvard Nebraska, conveying the South Half of the Northwest Quarter and the North Half of the Southwest Quarter of Section 35, Township 9, North, Range 7, West 6 P. M., Hamilton County, Nebraska, be and the same hereby are set aside and held to be null and void and of no force and effect and a cloud upon the title of the said Knute C. Engen and the said Mari Tollefsen Todok, and the same are ordered cancelled and stricken from the deed and mortgage records of Hamilton County, Nebraska; and the defendants Union State Bank of Harvard, a corporation, LeRoy A. Megrue and Bertha M. Megrue his wife, Robert E. Brown and Anna S. Brown, his wife, H. G. Thomas, Administrator of the estate of Christian Knudson, deceased, Theodore Griess and First Trust Company of Lincoln, Nebraska, and Van E. Peterson, receiver of the Union State Bank of Harvard, Nebraska, and Nebraska State Bank of Harvard, Nebraska, and all persons claiming under, by or through them or any of them, are hereby forever enjoined from claiming or asserting any right, title or interest in and to said North Half of Southwest Quarter and the South Half of Northwest Quarter of Section 35, Township 9, North, Range 7, West 6 P. M. Hamilton County, Nebraska, or any part thereof.

It is further ordered, adjudged and decreed that the costs be taxed to the defendants, exsept defendant Mari Tollefsen Todok.

To all of which the defendants and each of them, except the defendant Mari Tollefsen Todok, excepts, and give notice of appeal in open court.

The several motions of defendants for new trial are overruled, to which the said defendants duly excepted, and upon application of the defendants made in open court to fix the amount of supersedeas bond, such bond is fixed in the sum of $3000. for the defendant Nebraska State Bank of Harvard, Nebraska, who are in possession of said real estate, and for all other defendants each in the sum of $500

and are given forty days from the rising of the court within which to prepare and serve bill of exceptions.

By the Court:

L. S. Hastings, District Judge.

[File endorsement omitted.]

[fol. 55] In District Court of Hamilton County

Bill of Exceptions—Filed in Supreme Court Feb. 11, 1928

Erick K. Engen, called as a witness in behalf of the plaintiff and after being first duly sworn, testified as follows:

Examination by Mr. Edgerton:

1124 Q. Your name?

A. Erick K. Engen.

1125 Q. What does your middle initial "K" stand for?

A. Knudson.

1126 Q. How old are you Mr. Engen?

A. Sixty-nine.

1127 Q. Where were you born?

A. In Norway.

1128 Q. In what year?

A. In 1857.

1129 Q. What were the names of your father and mother?

A. My fathers name was Knute Engen and my mothers name was Bridgit.

1130 Q. What brothers and sisters do you have Mr. Engen?

A. I had two brothers and two sisters.

1131 Q. Your brothers names?

A. My own brother was Ole.

1132 Q. And the other one?

A. Christian Knudson they call him.

1137 Q. How old were you Mr. Engen when you came to America?

A. I was ten years old.

1138 Q. That would be in 1868?

A. Yes sir.

1139 Q. Did your brother, Chris, come with you at that time?

A. Yes sir.

1140 Q. How old was he at that time?

A. He was born in 1845, the 10th of January, about twenty-three years old.

[fol. 56] 1142 Q. At the time that you and he came to this country was he a married man?

A. Yes sir.

1143 Q. To whom was he married?

A. He married Mary Todok.

1144 Q. How long had he and this lady been married before you and he came to this country?

A. They must have been married about a year, married in '67 in the Spring.

1145 Q. Was it a church wedding?

A. Yes sir.

1146 Q. And did they live together there?

A. Until we came to this country in the Spring of '68.

1147 Q. What time of the year of '68 was it you sailed from Norway?

A. We left our home in Norway about the 16th of May.

1148 Q. Where did you go to first?

A. We went to Christiana.

1149 Q. How far did you live from Christiana?

A. About a hundred miles.

1150 Q. Your brother Christian at the time you went to Christiana had he intended to go to America?

A. I don't think he did.

1151 Q. Just explain that to the court?

A. One thing he was in the army, sold-er, and if he had lived there he would have been poor and he thought his wife would come after him and he asked my father if he had money enough to pay his fair across and he did so he came to this country.

1152 Q. Do you remember the date when you landed in America?

A. No I can't tell you, I think we landed in Wisconsin the 22nd of June, 1868.

1153 Q. You landed in New York I assume?

A. We came to Quebec.

1154 Q. You went to Quebec instead of New York?

A. Yes sir.

[fol. 57] 1155 Q. On the 22nd day of June 1868 you reached Madison?

A. Yes sir.

1156 Q. How long did you and your brother stay in Madison?

A. We stayed there about ten years.

1157 Q. Did you come out to Nebraska together in 1878?

A. He came here first in 1878.

1158 Q. Had he purchased any land in Wisconsin?

A. No sir.

1159 Q. Now when did you come to Nebraska?

A. I came out here in the Spring of '88.

1160 Q. Ten years later?

A. Yes sir.

1161 Q. During this ten years did you visit him here?

A. No, I was out here in the winter just before I moved.

1162 Q. Do you remember Mr. Engen whether your brother Chris. got letters from his wife while in Wisconsin?

A. Yes, quite often at first.

1164 Q. Do you know whether your brother wrote to her to come?

A. Yes I know he did.

1165 Q. And did you see any letters coming back from her?

A. Yes I did.

1168 Q. Did he tell you what the contents of the letters were?

A. Sometimes.

1171 Q. When you came to Nebraska in 1888 where was your brother living?

A. He was living on his home place.

1172 Q. And that is this 160 acres in controversy here?

A. Yes sir, section 35-9-7.

1173 Q. Who was living there with him at that time?

A. My parents were there at that time.

1174 Q. When did your parents come to this country?

A. Mother came in 1886 and father came the next Spring, 1887.

1175 Q. Do you know when your father and mother were born?

A. Yes sir.

[fol. 58] 1176 Q. When was your mother born?

A. The 16th of June 1818 and father was born the 3rd day of February, 1819.

1177 Q. And then your mother came in '86 and your father in '87?

A. Yes sir.

1178 Q. And in '88 when you came they were living there with him?

A. Yes sir.

1180 Q. Tell what your brother did there in the family when the father and mother was there with reference to care and maintenance?

A. He was the one that really took care of them, mother kept house for him, he bought the groceries and such things, he was the head of the family.

1181 Q. And what they could they did around there?

A. Yes sir.

1182 Q. Following 1888 have you lived continuously in Hamilton County yourself?

A. Yes sir.

1183 Q. How far is your present home from this quarter section?

A. About two miles and a half.

1184 Q. When did you buy your place?

A. In the Spring of '88 and lived there ever since.

1185 Q. What is the fact and state whether or not during the years since you have been frequently at your brother's place?

A. Yes sir.

1186 Q. How long did your father continue to live there with your brother?

A. He died in 1900, the last day of January.

1187 Q. And do you know how old a man he was at that time?

A. Eighty-one years old.

1188 Q. How long did your mother continue to live there?

A. She lived there with him until the Fall of 1905, she took sick and we took her home to our place.

1189 Q. When did she die?

A. The 8th day of April, 1906.

[fol. 59] 1190 Q. How old was she?

A. About eighty-eight years.

1191 Q. What was the condition of her health?

A. It was good until she took sick and died.

1192 Q. After your father died was just Chris and your mother living there?

A. Yes just the two of them living there.

1193 Q. And she did the housekeeping?

A. Yes sir.

1194 Q. Did, what you described as what he was doing for them continue after the father's death?

A. Yes sir.

1195 Q. You know the plaintiff, Knute C. Engen, Mr. Engen?

A. Yes sir.

1196 Q. When did Knute C. Engen come to this country?

A. He came to Nebraska in 1893, in the Spring.

1197 Q. When did you first see him or was that in '93?

A. To Nebraska.

1198 Q. When was the first time you ever saw him?

A. That was in that same Spring.

1199 Q. How old a man was he at that time?

A. About twenty-three years old.

1200 Q. Married or single?

A. Single.

1201 Q. And where did he go?

A. He stayed there with his father, my brother.

1202 Q. Did he do anything there?

A. Yes, he worked for his father that summer.

1203 Q. How long did he stay there with his father?

A. He stayed there, I guess, about a year.

1204 Q. Then where did he go?

A. He moved on another eighty that belonged to my brother and batched.

[fol. 60] 1205 Q. Did he stay there on your brother's place until he went to Alaska in '97?

A. Yes sir.

1206 Q. At that time when he left for Alaska was he married?

A. No he was not.

1207 Q. After your brother left Mr. Knudson's place and went over to your place did your brother continue to live on his home place?

A. Yes he lived there and batched.

1208 Q. The testimony is that he was blind when he died, about when did he get blind?

A. Nearly blind for four or five years nearly blind, at the last he couldn't see at all, his eyes were always weak as far as I can remember.

1209 Q. At the time he died what is the fact as to whether or not his own furniture was still in his house?

A. Yes it was.

1210 Q. What did that consist of?

A. A few chairs, bureau and stove I guess, wasn't very much.

1211 Q. A bed?

A. Yes sir.

1212 Q. Personal furnishings, keepsakes?

A. Yes sir.

1213 Q. From the time your mother left there up until he died, I wish you would tell the Court what part of the time he stayed there at his home?

A. He lived there at first after mother left, stayed there quite a while alone and stayed with McGrew's part of the time then another man moved in, Joe Taylor, then he stayed with him and they batched on the home place.

1214 Q. How long ago was that?

A. Couple of years.

1215 Q. When Joe Taylor was there whose furniture was used, your brothers?

A. Yes sir.

[fol. 61] 1216 Q. After he became blind how much of his time did he spend there?

A. I couldn't tell, he would go over there every once-in-awhile, got his meals over to McGrew's, walk over there every once-in-a-while, always called it his home.

1217 Q. And how far was the McGrew house from his house?

A. It must have been about twenty-five rods, only a little ways across the road.

1218 Q. Do you know whether he could go over there alone during the last few years?

A. Yes he could. He would stay awhile over there, sometimes he would stay all night.

1219 Q. Mr. Engen do you know of his sending funds back to his wife back in Norway?

A. Yes I do.

1220 Q. Tell the Court what you know about that?

A. I know at first he would send money quite often, then I guess he kind of neglected it for a good many years until his son came here, I know that he sent her money, then after his son came here he sent her money, the last time I know of I wrote a letter for him and he sent her $111.00 enough for 600 krones in Norway money.

1221 Q. When was that?

A. That was in '22 the year before he died.

1222 Q. Did you get a letter back from her saying she received the money?

A. Yes I got a letter and she thanked him for the money, said it was welcome in the shape she was in.

1235 Q. How frequently Mr. Engen during the last two or there years did your brother come over to visit you?

A. The last two or three years he didn't come over very often, the last time was about a year before he died, he was there a few days.

1236 Q. Did you see him over to McGrew's or his home place just before he died?

A. Yes sir.

[fol. 62] 1237 Q. When did you last see him?

A. I was there when he died on Monday the 6th of August.

1238 Q. Was he unconscious for sometime before he died?

A. No he wasn't.

1239 Q. How long had you been there before he died?

A. Not more than a couple of hours.

1240 Q. Did you see him the day before?

A. I saw him the day he took sick and I was there on Friday and Saturday.

1241 Q. What was his condition when you saw him Thursday?

A. He was in bad shape, he was sick.

1242 Q. Did you see the bottle of wine there that was testified to at that time?

A. No, I didn't see it.

1243 Q. Any talk about business matters?

A. Not at all.

1244 Q. After he died were you there in the afternoon when Mr. Thomas came out?

A. No, I was not, I went home right after he died, Mr. McGrew took me home.

1245 Q. I ask you whether your brother and his wife were living together before he came to this country?

A. Certainly they was.

1246 Q. When Knute came to this country do you know of your brother sending him money to come from North Dakota here?

A. Yes sir.

1247 Q. Do you know of the time he was in Alaska of your brother sending him money to come home?

A. No, he sent him money a couple of years before and he sent $50.00 but he didn't come at that time, it was a couple years after that he came.

1354 Q. And when your brother stayed in Harvard with Roy McGrew do you know of his going back to the home place during that year?

A. Yes he went back quite often.

1356 Q. How, during all these years, did he always refer to this place, the 160 in controversy?

Mr. Grosvenor: That is objected to as incompetent, irrelevant and immaterial, hearsay testimony, self-serving declarations.

Overruled.

A. Well when we used to talk about it he would always talk about it as his home when he was away or at our place he would say he was going back home, always called it his home.

[fol. 63] 2874 Q. Now do you know of your brother going to the Court and taking out his first naturalization papers?

Mr. Grosvenor: That is objected to as incompetent, irrelevant and immaterial, no proper foundation laid, for the further reason that it is accumulative and repetition of testimony heretofore taken in the trial of this case.

Overruled.

2875 Q. Do you know?

A. Yes I do remember when he went to take out his first papers.

2876 Q. And where?

A. Madison, Wisconsin.

2877 Q. What year?

A. I can't tell you exactly but I think in 1870.

2878 Q. About two years after you reached this country?

A. Yes sir.

2881 Q. Did you see his first papers that were given him by the officers?

A. Yes several times.

2882 Q. Now when did your brother Ciristian Knudson leave Wisconsin and come to Nebraska?

A. He left in May of 1878.

2883 Q. When did your father and mother come to Nebraska?

A. Mother came in 1886 July I think, and father came one year later 1887 along in May.

2884 Q. Where did they establish their home?

A. With my brother Chris.

2885 Q. And you came in 1888?

A. Yes sir.

2886 Q. At the time your father came here what deformity did he have?

A. He had a tumor under his arm.

2887 Q. What arm?

A. His right arm.

2888 Q. How large was it?

A. It was as large as my knee because he couldn't get [fol. 64] his arm down, held it up like this here (demonstrating).

2889 Q. And during the years following that did that tumor grow in size?

A. No it didn't seem to grow very much, later on it didn't grow very much.

2890 Q. After you came did you see your brother's first naturalization papers, after you came to Nebraska?

A. No I don't think I did.

2893 Q. When did you talk with him about his last papers?

A. Well it was shortly after I found out about that law.

2894 Q. At the time the law was changed?

A. Yes sir.

2895 Q. Where did you talk with him?

A. I think it was at our home.

2896 Q. What was said by your brother as to whether or not he had taken out his final papers?

Mr. Grosvenor: That is objected to as incompetent, irrelevant and immaterial, calling for hearsay.

Overruled.

A. Well I told him that he couldn't vote, that he would have to take out them or he couldn't vote, he said he wasn't going to bother with them and he never did try to vote again.

Mr. Grosvenor: We move to strike out the answer as not responsive.

By the Court: After "He never voted" may be stricken out.

2897 Q. Do you know as to his voting, whether he voted after that?

A. I know.

2898 Q. Did he vote after that?

A. He didn't vote after that.

Mr. Grosvenor: That is objected to as incompetent, irrelevant and immaterial, not the best evidence.

Overruled.

2899 Q. Did he vote after that?

A. He didn't vote after that.

[fol. 65] 2900 Q. Mr. Engen when your father came to this country what property did he have, if any?

A. He didn't have any property, he had a little money.

2901 Q. How much?

A. Between fifteen and sixteen hundred.

2902 Q. And did your mother have any money?

A. No.

2903 Q. What language did they speak?

A. Norwegian.

2904 Q. Could they speak English?

A. No sir, they couldn't.

2905 Q. What did your father do with that money?

A. I borrowed some of it and my brother Henry Severson got $500.00 and I got $900.00.

2906 Q. When did you get the $900.00?

A. In '86.

2907 Q. When did Severson get the $500.00?

A. In '87.

2908 Q. What did you do with the money that you got?

Mr. Grosvenor: That is immaterial.

Sustained.

2909 Q. During how long a time did you keep that money?

Mr. Grosvenor: The same objection.

Overruled.

A. I had that money when he died.
2910 Q. When your father died?
A. Yes.
2911 Q. Did you pay him regularly the interest on it?
A. I did not.
2912 Q. Why not?
A. Because I didn't have it and they didn't really need it.
2913 Q. Did you pay him anything on it?
A. Not very much.

Mr. Grosvenor: That is objected to as incompetent, irrelevant, and immaterial.

Overruled.

[fol. 66] 2914 Q. I think you said before that your brother supported your father and mother?
A. Yes he did.
2915 Q. Was your father able to work and support himself?
A. No sir he could not at that time.
2916 Q. With this deformity under his arm was there any steady employment that he could get?

Mr. Grosvenor: That is objected to as incompetent, irrelevant and immaterial, leading and suggestive.

Sustained.

2917 Q. What were the facts there as to your father being able to work steadily at anything?

Mr. Grosvenor: That is objected to as incompetent, irrelevant and immaterial.

Overruled.

A. His age was one defect and that tumor that he had was another.
2918 Q. What kind of work was he able to work at?

A. He was able to do chopping and thing like that, never drove a work team in Wisconsin he work and grubbed and chopped wood and such as that.

2919 Q. How old was your father when he died?

A. He was 81 years old.

2920 Q. And how old was your mother when she died?

A. She was nearly 88.

2921 Q. Do you know whether Severson repaid any of those funds that he borrowed?

A. I don't think he did because I saw a note when father died and no indorsement on it.

2922 Q. When was this note dated?

A. I can't say, but it must have been in 1887 when we got the money.

2923 Q. Who paid your father's funeral expenses?

A. I did.

2924 Q. He died in what year?

A. He died in 1900.

2925 Q. During what years did that condition apply when you said you weren't able to pay the principal or interest?

A. Along in the '90's. '92 and up until the latter part of the '90's.

2926 Q. During those years was your mother able to support herself?

A. No I don't think so.

[fol. 67] 2927 Q. Or to take care of herself and support herself?

A. She did a little house work for my brother that is all she could do.

2928 Q. Did your brother help her about the house work?

A. Yes he did once in a while.

2929 Q. And after your father's death your mother continued to live there until shortly before her death?

A. Yes sir.

2930 Q. That was with Christian Knudson in his home?

A. Yes sir.

2931 Q. What was the condition of her health the last few years of her life?

A. Well she was pretty good for an old woman like she was.

2932 Q. How long was she in your home before she died?

A. About the middle of September until the 8th day of April, the next Spring that was in 1905.

2933 Q. What was the condition of her health during that time?

A. She was sick in bed.

2934 Q. At the time you took her over to your home was she sick in bed?

A. Yes sir.

2935 Q. And had been for sometime?

A. She was able to be up but she was feeling sick, that is the reason we took her home, nobody there to take care of her.

No cross-examination.

Witness dismissed.

Further examination of the witness Eric K. Engen by the Court:

2936 Q. Mr. Engen did you ever pay that money back to your father?

A. No sir.

2937 Q. Did they have your note for it?

A. Yes sir they had my note for it.

2938 Q. Did they ever give it back to you?

A. No.

Witness dismissed.

[fol. 68] Mrs. Bertha McGrew, called as a witness in behalf of the plaintiff and after being first duly sworn, testified as follows:

Examination by Mr. Edgerton:

222 Q. You may state your name?

A. Mrs. Bertha McGrew.

223 Q. Where do you live?

A. At Harvard, Nebraska, 6 miles north.

224 Q. In what county?

A. Hamilton County.

225 Q. How long have you lived in Hamilton County?

A. About forty-seven years.

226 Q. You were born in Hamilton County?

A. Yes sir.

227 Q. What was your maiden name?

A. Severson.

228 Q. And your mother's name?

A. Mary Engen.

229 Q. What relation was she to Christian Knudson?

A. Sister.

230 Q. What relation to Erick K. Engen?

A. Sister.

231 Q. From what country did your mother come?

A. Norway.

232 Q. Did you know Christian Knudson?

A. Yes sir.

233 Q. Where was he living at your earliest recollection of him?

A. At his old home place.

234 Q. Where were you living at that time?

A. I was living about a half mile from there on my father's homestead.

[fol. 69] 235 Q. And where do you now live with reference to the Christian Knudson home place?

A. Right across the road from him.

236 Q. How far is your house from his house?

A. Well I should judge about 20 rods.

237 Q. On what section is your home of yourself and husband?

A. Thirty-four.

238 Q. And in what section was his land?

A. Thirty-five.

239 Q. What part,—do you know what part of Section Thirty-five his house was located on?

A. It was on the Southwest Quarter.

240 Q. Of thirty-five.

A. Yes sir.

241 Q. When were you born Mrs. McGrew?

A. The year 1879.

242 Q. Can you tell approximately when it was when you first recollect your uncle Christian Knudson?

A. Well about as old as I can remember anything I remember him and remember that he used to come to our place when I was a little girl.

243 Q. Do you remember when Eric K. Engen came to Hamilton County?

A. I remember but not exactly the year.

244 Q. Was it sometime after your first recollection of Christian Knudson?

A. Yes sir, at least 10 years later.

245 Q. Where is Eric K. Engen's home with reference to your home?

A. Three miles northwest of us.

246 Q. Has he lived in that vicinity ever since he came?

A. Yes sir.

247 Q. Later did the father and mother of Christian Knudson come to this country?

A. Yes sir.

[fol. 70] 248 Q. Where did they establish their home?

A. They lived with Uncle Chris.

249 Q. Do you know approximately when they came?

A. I think in about 1886.

250 Q. What was their names?

A. Knute and Bridget Engen.

251 Q. How long, if you know, did your grandfather and grandmother live there?

A. My grandfather died there in 1900.

252 Q. And your grandmother?

A. She lived there until 1906, I believe it was that she was taken sick and taken to my other uncle, Eric K. Engen, and she died there.

253 Q. How old was your grandfather when he died?

A. Eighty-one.

254 Q. And your grandmother died what year?

A. 1906 I believe.

255 Q. How old was she at that time?

A. Eighty-eight.

256 —. Do you know the plaintiff, Knute C. Engen?

A. Yes sir.

257 Q. When did you first know him?

A. When he first came here about 30 years ago.

273 Q. Do you know of Christian Knudson,—know anything about Christian Knudson's wife?

A. I don't know anything about her only just hearing.

274 Q. From Christian Knudson himself?

A. My mother spoke of her so I knew there was such a woman. I never asked Uncle Chris about here.

275 Q. Christian Knudson died at your place?

A. Yes sir.

276 — What date?

A. The 6th of August 1923.

[fol. 71] 277 Q. What was the condition of his eyesight at that time?

A. He was totally blind at that time.

278 Q. How long had he been totally blind?

A. For about 10 years that he couldn't see to distinguish objects.

292 Q. At that time Mrs. McGrew or just before that had Mr. Knudson returned to your house from somewhere else?

A. He used to go to town and back and I can't say just what date he came back prior to that some time in July we had been to town.

293 Q. For what period of time?

A. I can't remember how long he was gone at that time, some time he would stay a week and take two treatments and then come back on out.

294 Q. During that summer how much of the time, if any, did he spend over to his home?

A. Days when he felt good he would go over there every day.

295 Q. During the several years preceeding that what had been his habit with reference to his own home?

A. He made that his home and aimed to stay there, of course in later years he would take his meals with us later.

296 Q. What do you know with reference to his maintaining and keeping in his home furniture?

A. He had had some old furiture, he always had a bed and a little old bureau and an oil stove.

297 Q. During that 10 years that you say he was blind how much of the time would you say he spent at his own home approximately?

A. In the 10 years?

298 Q. Yes.

A. Well all of it practically, except the last three years.

299 Q. And what did he do in the last three years?

A. He spent most of his time with us.

[fol. 72] 300 Q. Did you talk with him in reference to his home?

A. Yes sir.

301 Q. What did he say?

A. He always referred to it as his home, he would go over there in the afternoon to take his nap, spoke of getting someone to stay with him and move back, said we would probably get tired of him, and always spoke of finding someone suitable and take them in.

302 Q. At any time did you ever hear him refer to it other than as his home?

A. No that was the only home he ever knew.

303 Q. For a number of years Joe Taylor was there with him?

A. Yes sir.

304 Q. Do you know about how many years Joe Taylor was there?

A. Possibly five years.

305 Q. How did they get along?

A. Joe in the first place was to stay there and cook and do the work and then he rented a little piece of corn land and in between times Joe would work it and that left Uncle Chris alone until night and at those times he came to our place and got his meals and then after that he came over and stayed with use and Joe had his room at Uncle Chris' house.

306 Q. At the time Uncle Chris died do you know whether any of the furniture belonged to anybody else besides your Uncle Chris?

A. No.

307 Q. Did it belong to anyone else?

A. No sir.

308 Q. What was done with it?

A. It was sold at the sale Joe Taylor held.

309 Q. Do you know of your Uncle Chris sending money back to his wife in Norway?

A. He never sent any through me but I knoe he has sent it.

[fol. 73] 310 Q. Did you hear him say he was sending money to her?

A. He told me two or three times that he was sending her money, showed me the envelope that his mother had addressed to her, took it to the bank.

384 Q. Mrs. McGrew just going back for a question—Do you know whether the dishes that were in the Christian

Knudson house were the dishes he had all the time he lived there?

A. Yes sir.

385 Q. And were the dishes he used during the time his father and mother lived there?

A. Yes sir.

386 Q. During the time they lived there did he support them there?

A. Yes sir.

387 Q. Can you tell the court approximately when in 1923 Christian Knudson went over to his home and slept there?

A. He used to go over in the afternoon, that last summer, and take a nap in the daytime but I can't remember when he stayed all night, but I know in the early Spring there came a snow in the evening when he was there and he stayed all night and I went over in the morning and he said he had stayed with Joe all night.

388 Q. He had a bed and mattress and quilts there?

A. Yes sir.

389 Q. And kept them there through all these years?

A. Yes sir.

392 Q. Over at this home of Christian Knudson what did he have in the way of a family album and personal articles that he owned?

A. He used to have an old truck with an old album in it and his father's old Bible and a few old things like that.

393 Q. Were those there up until the time of his death?

A. I think they were.

394 Q. Never brought to your house?

A. No.

[fol. 74] 1358 Q. Did you and Mr. McGrew live in Harvard one year?

A. Yes sir.

1359 Q. When was that?

A. We had our sale in March of '21 and moved the same day, the latter part of February or the 1st of March we moved back out, in March 1922.

1360 Q. During that year did Mr. Christian Knudson stay with you some?

A. Most of the time.

1361 Q. What is the fact as to whether or not he went back to his home place during that time?

A. During that time he was gone from our place and he was at his brother's place some and he was there with Joe some and he would stay there at the home place. In the Spring of '22 he went out and stayed at his home for about three weeks while we were moving and getting packed up and then for a week or two he just came for his meals and slept over there at his home.

Cross-examination of Mrs. Leroy A. McGrew.

Examination by Mr. Williams:

1362 Q. When you moved to Harvard in March 1921 at that time was Mr. Knudson living with you on the farm?

A. Yes sir.

1363 Q. When you moved he moved?

A. He went to his brother's and stayed during the time that we had our sale.

1364 Q. When you got located in town he came to you?

A. Yes sir.

Redirect examination of Mrs. Leroy A. McGrew.

Examination by Mr. Edgerton:

1365 Q. And stayed there as you have heretofore described?

A. Yes sir.

1366 Q. What did he take there, just his clothes?

A. Yes sir, about what he had and one change.

[fol. 75] 1367 Q. No furniture?

A. No.

1368 Q. No other property?

A. No.

Witness dismissed.

[fol. 76] Leroy A. McGrew, called as a witness in behalf of the plaintiff and after being first duly sworn, testified as follows:

Examination by Mr. Edgerton:

563 Q. State your name?

A. L. A. McGrew.

564 Q. What is your first name?

A. Leroy.

565 Q. Where do you live?

A. Harvard, Nebraska, Hamilton County.

566 Q. How long have you lived in Hamilton County Mr. McGrew?

A. Well I think about twenty-four years.

567 Q. And in the same part of the county where you now live?

A. Yes sir.

568 Q. What section is your home in?

A. Section Thirty-four.

569 Q. Town. Nine and Range Seven?

A. Yes sir.

570 Q. How long have you lived on that farm?

A. I have lived on that farm about sixteen years practically where I have built now, I have lived on the farm right close to twenty-four years.

571 Q. Where is that situated with reference to the farm of Christian Knudson?

A. Just across the road.

572 Q. It is in section thirty-five?

A. Yes sir.

573 Q. How long had you known him before he died?

A. I have known him ever since I have been in Hamilton County, knew him before by sight and the last twenty-three or twenty-four years I associated with him.

574 Q. Where was his house with reference to your house?

A. Almost straight east.

[fol. 77] 575 Q. How far?

A. Possibly about twenty rod- I should judge.

576 Q. What kind of a house did he have?

A. An "L" shaped house.

577 Q. How was it furnished?

A. Furnished very common like most of the old country people did it.

578 Q. When did you first know him?

A. About thirty years ago I met him.

579 Q. When you first knew him where was he living?

A. Where his house now stands.

580 Q. Who was living with him?

A. He was batching then.

581 Q. Did you also know him when his father and mother were there?

A. Yes sir. His father died about the time I moved up there but his mother lived with hi ı after that.

582 Q. After his father died was there just the two of them living there?

A. Just the two of them there.

583 Q. Back in that time twenty-six years ago, was he farming his own place?

A. Yes, a little further back than I can tell you I think he did farm it at that time, more of it.

590 Q. After Knute went west how did the old gentleman live and manage his place after Knute left in 1907?

A. Well he first came over to my place and stayed, stayed there some time but would go back and forth, went home some nights and sometimes he would stay all night at my place.

591 Q. How long has he been blind?

A. He was almost blind twenty-three years ago, but he became totally blind the last ten or twelve years.

592 Q. At the time he died he was at your place?

A. Yes sir.

[fol. 78] 593 Q. Had he been—what percent of the time had he been staying at your place?

A. He had been staying there just before he died all the time.

594 Q. For three or four years prior to that where had he lived and stayed?

A. He stayed with us practically all the time only when he would go to visit or across the road over home, he stayed all night once in a while over there, lots of times he would follow the fence with his cane.

595 Q. How did he speak of the home place?

A. He always said "Well I will go over home a little while" and he would go over there and sit down and take a nap.

596 Q. Have a bed and mattress?

A. Yes sir. He always had a bed tick, he could sleep all by himself, he said after a fellow has lived in a place as long as I have he hates to give it up.

597 Q. During the last three or four years he stayed at your house a good part of the time?

A. Yes sir.

598 Q. During that time was there any month that he didn't go back to his own home and stay part of the time?

A. I don't think so.

599 Q. Would he frequently stay more than one night?

A. Sometimes he would stay a couple of days. I would generally go over and see if he wanted to come home and he generally stayed until the weather got a little better.

600 Q. Prior to or going back to say, 1920, what was his habit in staying at home?

A. He always did just this way after he quit staying continuously at home he always went back a few times.

601 Q. Would he frequently go over alone?

A. Sometimes.

602 Q. How did he manage to find the way?

A. He would generally go out until he reached the road then follow the fence line with his cane.

[fol. 79] 625 Q. Do you remember Mr. McGrew when was the last time that Spring or Summer that he went over home to stay for any period of time?

A. The longest spell he took was in the Spring because it came on a snow storm and during the summer he was back and forth, during the summer he would be over there and stay in the afternoon and sometimes slept alnight, I can't give you the date.

626 Q. When was it he first made arrangements to come over and stay at your place?

A. About eighteen years ago he came to me and asked me if the time came when he couldn't take care of himself, said it was coming, can he depend on us, said it was worth a whole lot to have someone he could depend on.

627 Q. During all that eighteen years whenever he came you made him welcome?

A. Yes sir, and I should judge about twelve years ago he was in bed a month with the —

628 Q. Was he totally blind at that time?

A. Practically.

1369 Q. Mr. McGrew you remember the year that you and Mrs. McGrew lived in Harvard?

A. Yes sir.

1370 Q. What part of the time or how did Mr. Christian Knudson stay with you folks?

A. Well he was with us part of the time, I can't give you the exact dates, and he went out home and some to his brother's.

1371 Q. By "home" what do you mean?

A. His old home out there.

1372 Q. Did you at his request ever take him out there to his old home?

A. Yes sir, once or twice.

1373 Q. Did he stay over night?

A. Yes sir.

[fol. 80] 1374 Q. Just before you moved back on the farm what did he do?

A. Before we moved back he went on out there and stayed for quite a period.

1375 Q. Who was living on the farm there?

A. Joe Taylor.

* * * * * * *

[fol. 81] EXHIBIT "A"—Def. Bank. G. B. H.

Harvard, Nebraska, July 17th, 1923.

Mr. H. G. Thomas, Harvard, Nebraska.

DEAR SIR: I hereby deliver to you for the benefit of the grantees therein named, deeds made by me conveying lands as follows:

To Robert E. and Anna S. Brown, the South Half of the North West Quarter, Section Thirty-five, Township Nine, Range Seven, Hamilton County, Nebraska.

To LeRoy A. and Bertha M. Megrue the North Half of the Southwest Quarter, Section Thirty-five, Township Nine, Range Seven, Hamilton County, Nebraska.

To Christian and Clarence Engen, the West Half of the Southeast Quarter of Section Thirty-five, Township Nine, Range Seven, Hamilton County, Nebraska.

These deeds you are authorized and directed to deliver to the grantees therein named upon my death in any event, but not earlier except I shall hereafter desire it.

(Signed) Christian (his x mark) Knudson.

In presence of and witness to mark: Ambrose C. Epperson, Theo. Griess.

[fol. 82] EXHIBIT "C"—Def. Bank. G. B. H.

Know all men by these presents that Christian Knudson of the County of Clay and State of Nebraska, for and in consideration of a valuable consideration, consisting of care, attention and companionship in hand paid do hereby grant, bargain, sell, convey and confirm unto LeRoy A. Megrue and Bertha M. Megrue of the County of Hamilton and State of Nebraska, the following described real estate situated in Hamilton County and State of Nebraska, to wit: The North Half of the South West Quarter (N. ½ S. W. ¼), of Section Thirty-five (35), Township Nine (9), Range Seven (7), West of the Sixth P. M.

The grantor hereby reserves the use of said land during his lifetime.

To have and to hold the premises above described, together with all the tenements, hereditaments and appurtenances thereunto belonging unto the said LeRoy A. Megrue and Bertha M. Megrue, and to their heirs and assigns forever, and I do hereby covenant with the said grantees and with their heirs and assigns, that I am lawfully seized of said premises; that they are free from encumbrance; that I have good right and lawful authority to sell the same; and I do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever.

And the said —— —— hereby relinquishes all ← in and to the above described premises.

Signed this 17th day of July, A. D. 1923.

(Signed) Christian (his x mark) Knudson.

In presence of and witnesses to mark: Ambrose C. Epperson, Theo. Griess.

STATE OF NEBRASKA,
Clay County, ss:

On this 17th day of July, A. D. 1923, before me, the undersigned H. G. Thomas, a Notary Public, duly commissioned and qualified for and residing in said County, personally came Christian Knudsen, to me known to be the identical person whose name is affixed to the foregoing instrument as grantor and acknowledged the same to be his voluntary act and deed.

Witness my hand and Notarial Seal the day and year last above written.

H. G. Thomas, Notary Public. (Seal.)

[fol. 83] EXHIBIT "D"—Def. Bank. G. B. H.

Know all men by these presents that Christian Engen of the County of Hamilton and State of Nebraska, for and in consideration of a valuable consideration, consisting of care, attention and compan-ship in hand paid, do hereby grant, bargain, sell, convey and confirm unto Robert E. Brown and Anna S. Brown, of the County of Clay and State of Nebraska, the following described real estate situated in Hamilton County, and State of Nebraska, to wit: The South Half of the Northwest Quarter (S. ½ N. W. ¼) of Section Thirty Five (35), Township Nine (9), Range Seven (7), West of the 6th P. M.

The grantor hereby reserves the use of said land during his lifetime.

To have and to hold the premises above described, together with all the tenements, Hereditaments and appurtenances thereunto belonging, unto the said Robert E. Brown and Anna S. Brown and to their heirs and assigns forever. And I do hereby covenant with the said Grantees and with their heirs and assigns, that I lawfully seized of said premises; that they are free from encumbrance, that I have good right and lawful authority to sell the same; and I do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever. And the said —— —— hereby relinquishes all — in and to the above described premises.

Signed this 17th day of July A. D. 1923.

(Signed) Christian (his X mark) Engen.

In presence of and witnesses to mark: Ambrose C. Epperson, Theo. Griess.

STATE OF NEBRASKA,
Clay County, ss:

On this 17th day of July, A. D. 1923, before me, the undersigned H. G. Thomas, a Notary Public, duly commis-

sioned and qualified for and residing in said county, personally came Christian Engen, to me known to be the identical person whose name is affixed to the foregoing instrument as grantor and acknowledged the same to be his voluntary act and deed.

Witness my hand and Notarial Seal the day and year last above written.

(Signed) H. G. Thomas, Notary Public. (Seal.)

[fol. 84] EXHIBIT

Sweden—Amity and Commerce

Treaty of Amity and Commerce Between the United States of America and the Kingdom of Sweden

Signed April 3, 1783. Ratified by the Continental Congress July 29, 1783. Proclaimed by Congress September 25, 1783.

(This treaty terminated by its own limtitation in 1796; the articles printed were revived by the Treaty of September 4, 1816, and by Article XVII of the Treaty of July 4, 1827.)

Translation

The King of Sweden, of the Goths and Vandals &c. &c. &c. and the thirteen United States of North America, towit, New Hampshire, Massachusetts bay, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, the counties of New Castle, Kent, and Sussex on Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, desiring to establish in a stable and permanent manner, the rules which ought to be observed relative to the correspondence which the two parties have judged necessary to establish between their respective countries, states and subjects His Majesty and the United States have thought that they could not better accomplish that end than by taking for a basis of their arrangements the mutual interest and advantage of both nations thereby avoiding all those burdensome preferences, which are usually scources of debate, embarrassment and discontent, and by leaving each party at liberty to make re-

specting navigation & commerce, those interior regulations which shall be most convenient to itself.

With this view, his Majesty the King of Sweden has nominated and appointed for his plenipotentiary Count Gustavus Philip de Creutz, his ambassador extraordinary to His Most Christian Majesty, & Knight Commander of his orders; and the United States on their part have fully empowered Benjamin Franklin, their Minister plenipotentiary to his Most Christian Majesty.

The said plenipotentiaries after exchanging their full powers and after mature deliberation in consequence thereof have agreed upon, concluded and signed the following articles:

* * * * * * *

[fol. 85] Article 6 of Treaty

The subjects of the contracting parties in the respective States may freely dispose of their goods and effects, either by testament, donation or otherwise in favor of such persons as they think proper; and their heirs in whatever place they shall reside shall receive the succession even ab intestato either in person or by their Attorney without having occasion to take out letters of administration. These inheritances as well as the capitals and effects, which the subjects of the two parties in changing their dwelling, shall be desirous of removing from the place of their abode shall be exempted from all duty, called "droit de detraction" on the part of the government of the two states, respectively. But it is at the same time agreed that nothing contained in this Article shall in any manner derogate from the ordinances published in Sweden against emigrations or which may hereafter be published, which shall remain in full force and vigor. The United States on their part or any of them, shall be at liberty to make, respecting this matter, such laws as they think proper.

[fol. 86] Minute entry of argument and submission December 5, 1928, omitted in printing.

[fol. 87] IN SUPREME COURT OF NEBRASKA

No. 26236

KNUTE C. ENGEN, Appellee, Cross-appellee

v.

UNION STATE BANK, HARVARD, et al., Appellees, Cross-appellees; Van E. Peterson et al., Appellees, Cross-appellants; Impleaded with First Trust Co., Lincoln, Appellant, Cross-appellee

Appeal from the District Court of Hamilton County

JUDGMENT—Feb. 21, 1929

This cause coming on to be heard upon appeal from the district court of Hamilton county, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds error apparent in the record of the proceedings and judgment of said district court. It is, therefore, considered, ordered and adjudged that said judgment of the district court be, and hereby is, reversed and cause remanded with instructions to said district court to enter a decree dismissing the petition of plaintiff and the cross-petition of the defendant, Mari Tollefsen Todok, and adjudging each and all of the mortgages and conveyances in suit valid and enforceable; that appellant pay all costs in-[fols. 88 & 89] curred herein, taxed at $—, and have and recover of and from appellees its costs so expended; that appellees pay all costs incurred herein by them, taxed at $—; for all of which execution is hereby awarded, and that a mandate issue accordingly.

Opinion by Eberly, J.

W. B. Rose, Acting Chief Justice.

[fol. 90] IN SUPREME COURT OF NEBRASKA

26236

ENGEN

v.

UNION STATE BANK OF HARVARD

OPINION—Filed February 21, 1929

1. The French words "fonds et biens," translated as "goods and effects," include realty, as they appear in the following terms of the existing treaty between the United States and Norway: "The subjects of the contracting parties in the respective states may freely dispose of their goods and effects, either by testament, donation, or otherwise, in favor of such persons as they think proper; and their heirs, in whatever place they shall reside, shall receive the succession even ab intestato, either in person or by their attorney." Erickson v. Carlson, 95 Neb. 182, approved and followed.

2. Treaty rights of aliens must be enforced by state courts without regard to conflicting statutory provisions.

3. The provisions of the homestead act (Comp. St. 1922, secs. 2816-2832), operating as restraints on alienation are, to that extent, repugnant to, and inconsistent with, the rights guaranteed by terms of this treaty stipulating that "the subjects of the contracting parties in the respective states may freely dispose of their goods and effects ("fonds et biens") either by testament, donation, or otherwise, in favor of such persons as they think proper."

4. As to conveyance of real estate authorized by such treaty, even though consisting of the dwelling house in which the grantor resides and its appurtenances, and the land on which it is situated, the restraints on alienation imposed by such homestead act are to that extent inoperative.

[fol. 91] Heard Before Goss, C. J.; Rose, Dean, Good, Thompson, and Eberly, JJ., and Redick, District Judge

EBERLY, J.:

This is primarily a suit to cancel deeds made by Christian Knudson in his lifetime conveying to his two nieces,

Anna S. Brown and Bertha M. Megrue and husbands, respectively, eighty-acre tracts in Hamilton county Nebraska. The pleadings embrace other issues, however, but the finding of the trial court was such as rendered the validity of the deeds, above referred to, the controlling question.

The undisputed facts in the record appear to be that Christian Knudson, a son of Norwegian subjects, was born in Norway, January 10, 1845, and married Mari Tollefsen Todok, also a subject of Norway, at a church wedding in that country; that thereafter they lived together in Norway until the spring of 1868. Knudson and his brother, Eric Engen, left their home in Norway May 16, 1868, and arrived in Wisconsin, June 22, 1868. Knudson came to Nebraska in 1878. His wife, Mari Tollefsen Todok, and his child remained at their home in Norway. The wife never came to the United States and at all times has continued a resident and subject of Norway. There is no evidence in the record that the naturalization of Christian Knudson as a citizen of the United States was ever completed. The plaintiff in this action, Knute C. Engen, the son of Christian Knudson and Mari Tollefsen Todok, left the Norway home and came to Nebraska in 1893, when he was 23 years old. He then worked for his father about one year on the father's place after his arrival and then permanently left his father's residence. The mother of Knudson was born June 16, 1818, and his father was born [fol. 92] February 3, 1819. His mother came to Nebraska in 1886 and the father in 1887 and joined Knudson who was then living on the 160 acres in controversy. Knudson took care of the old folks and supplied the provisions for them. Knudson's father died in this home January 31, 1900, being 81 years old; the mother died April 8, 1906, being 88 years old.

There is no evidence in the record that either the father or mother of Knudson was a naturalized citizen of the United States. On July 17, 1923, Christian Knudson in consideration of the care that his niece and her husband rendered to him, deeded the north half of the southwest quarter of section thirty-five, township nine, range seven, Hamilton county, to Bertha M. Megrue and Leroy A. Megrue. On October 2, 1923, the Megrues deeded this land to the Union State Bank of Harvard for a consideration of $9,600, and the Union State Bank conveyed in turn to Theo-

dore Griess, its president, who on September 22, 1924, borrowed from the First Trust Company of Lincoln $4,500, and executed a mortgage upon this land to secure the same to that organization. On July 17, 1923, Christian Knudson, in consideration of the care rendered by his niece and her husband also deeded the south half of the northwest quarter of section thirty-five, township nine, range seven, Hamilton county, to Anna S. Brown and Robert E. Brown. On September 17, 1923, the Browns deeded the premises thus received to the Union State Bank of Harvard for a consideration of $8,000. This bank in turn deeded to Theodore Griess, who borrowed from the First Trust Company of Lincoln $5,000, and executed a mortgage to secure the same on September 22, 1924, to such trust company.

[fol. 93] The district court by special findings determined, in addition to certain other facts, that Christian Knudson, sometimes known as Christian Engen, was at all times an alien and a subject of Norway, having never completed his naturalization in the United States, and that the defendant and cross-petitioner, Mari Tollefsen Todok, was his legal wife and was living in Norway at the time of his death; that Christian Knudson settled in Nebraska in 1878 and established a homestead which embraced the premises in controversy, and continued to reside upon said real estate as his homestead until his death, August 6, 1923; that the warranty deeds to the Megrues and the Browns referred to were each void and without force and effect for the sole reason that the lands purporting to be conveyed thereby were a part of the homestead of said Christian Knudson, and these deeds were not signed and acknowledged by his wife, the defendant, Mari Tollefsen Todok, and were therefore void. The court further determined that the conveyances made by the Megrues and Browns of the title thus received by them to the Union State Bank of Harvard were likewise null and void and of no force and effect for the sole reason that none of the grantors, due to the invalidity of the deeds as determined, had title to said real estate, and that the title thereof remained and continued to be vested in Christian Knudson, and that on August 6, 1923, when he died intestate leaving as his sole and only heirs at law his wife, the defendant, Mari Tollefsen Todok, and his son, the plaintiff, Knute C. Engen, the fee title to such real estate descended and vested in them, half and half,

share and share alike; and the court further found expressly that there was no fraud, conspiracy, or undue influence exercised by the defendants, or their agents, on said Christian [fol. 94] Knudson, as alleged in plaintiff's petition. The decree was entered accordingly. Van E. Peterson, receiver of the Union State Bank of Harvard, Nebraska State Bank of Harvard, and First Trust Company of Lincoln appeal.

A careful consideration of the evidence contained in the record inclines us to the belief, consistent with the findings of the trial court who heard the evidence and observed the witnesses who testified in person before him, that there was no fraud, conspiracy, or undue influence exercised by the defendants, or their agents, on Christian Knudson concerning, or in connection with, the conveyances of the premises involved in this litigation to the defendants Browns and the defendants Megrues. We further agree with the district court that the evidence sustains the conclusion that Knudson, the deceased, was at all times a subject of Norway and not a citizen of the United States.

"Foreigners by birth are presumed to be aliens. The status of a person as to alienage, when once established, is presumed to continue until the contrary is proved." 2 C. J. 1045, sec. 4; Hauenstein v. Lynham, 100 U. S. 483.

The mere fact of long residence in this country is insufficient to overcome this presumption. Ehrlich v. Weber, 114 Tenn. 711.

In addition, the evidence of the record before us, though somewhat meager on this point, tends to support the same conclusion. We have before us for determination, therefore, the question of rights wholly derived from a subject of Norway, and who was an alien both at the time of the [fol. 95] execution of the conveyances questioned and at the time of his death.

As to the situation thus presented, this court is committed to the view that the sixth article of the treaty of 1783 with Sweden incorporated by reference in the treaty of 1827 with Sweden and Norway, and which as to Norway still is in force, is controlling. The doctrine announced by this court in Erickson v. Carlson, 95 Neb. 182, is as follows:

"The French words 'fonds et biens,' translated as 'goods and effects,' include realty, as they appear in the following

terms of a treaty between the United States and Sweden: 'The subjects of the contracting parties in the respective states may freely dispose of their goods and effects, either by testament, donation, or otherwise, in favor of such persons as they think proper; and their heirs, in whatever place they shall reside, shall receive the succession even ab intestato, either in person or by their attorney.' " 8 U. S. St. at Large, p. 64, art. VI.

"Treaty rights of nonresident aliens must be enforced by state courts without regard to conflicting statutory provisions." Erickson v. Carlson, 95 Neb. 182; Butschkowski v. Brecks, 94 Neb. 532.

In other words, the accepted doctrine of the court is:

"Under section 2, art. VI, Constitution of the United States, 'all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby; anything in the Constitution or laws of any state to the contrary, notwithstanding.'

[fol. 96] "State courts will take judicial notice of the existence of a treaty, and if its provisions are self-executing it is unnecessary to plead its existence." Butschkowski v. Brecks, 94 Neb. 532. See, also, Goos v. Brocks, 117 Neb. —.

To what extent, if any, is the claims of homestead in the property in controversy made on behalf of Mari Tollefsen Todok sustained and supported by the words quoted. These treaty provisions, referred to, date from 1783.

Homestead laws are strictly of American origin. The earliest statute of this kind was that enacted by the Republic of Texas, January 26, 1839. The first constitutional guaranty of homestead exemption was that of the Constitution of Texas in 1845. This was followed in turn by Vermont in 1849. All other states of the American Union adopted this policy at a date subsequent to 1849. In view of the history of the development and adoption of this public policy, it can hardly be inferred that the question of homestead rights were in contemplation of the makers of the treaty of 1783. True, the thirteen American states which then formed the Confederacy had each substantially adopted, for the benefit of the wife, the English doctrine of dower as defined at common law. Even so, it is, and

was, an established doctrine of the common law that "dower rights are cast upon the widow by operation of law, and it is well-settled common-law rule that an alien cannot cast any dower rights upon his wife, nor can an alien widow of a citizen take by dower any interest in her husband's lands." 2 C. J. 1066, sec. 32.

An examination of the terms of the treaty before us discloses no intention to extend the benefits of common-law [fol. 97] dower to the wife of the alien; in fact, no provision therein contained discloses any purpose to create or provide for her benefit any special rights or privileges whatever because of, or based upon, a martial relation sustained to an alien owner of property. On the contrary, this instrument expressly stipulates for conferring upon the "subjects of the contracting parties in the respective states" the unlimited, unrestricted, and unqualified right to "freely dispose of their goods and effects ("fonds et biens"), either by testament, donation, or otherwise (which necessarily includes the right to convey by deed), in favor of such persons as they think proper." This, in legal effect, is wholly inconsistent with the right of dower, and, in like manner, inconsistent with the existence of statutory right of homestead, in real estate to which the treaty applies.

For, if we consider the provisions of section 2819 and section 2832, Comp. St. 1922, as applicable to the subject of the present action, it necessarily follows that certain property within the purview of the treaty before us "cannot be conveyed * * * unless the instrument by which it is conveyed * * * is executed and acknowledged by both husband and wife;" and also that such property (homestead) "vests on the death of the person from whose property it was selected, in the survivor, for life, and afterwards in the decedent's heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will."

[fol. 98] The statutory provisions referred to thus assume the nature of limitations, qualifications, or modifications of the treaty itself, and, if valid, would necessarily change its true construction. Each of these provisions of the legislative enactment must therefore be considered to be pro tanto inconsistent with the terms of the controlling treaty properly construed. The conclusion follows that, to the ex-

tent inconsistent with the terms of the treaty, the statutory provisions are inoperative. The unquestioned rule of construction requires that the provisions of the treaty must be liberally construed and given full force and effect "anything in the Constitution or laws of any state to the contrary, notwithstanding." Therefore, the legal effect of the conveyances executed by Christian Knudson must be determined wholly by the powers conferred on him by treaty, and not by the inconsistent limitations and restrictions prescribed in the Nebraska homestead act. So considered, the validity of these conveyances cannot be questioned and they were each effective in vesting the titles to the lands described therein to the grantees therein named. These instruments being valid, it also follows that the subsequent deeds and mortgages affecting the titles, which were, in the district court, decreed to be void, are likewise valid and effective.

The judgment is therefore reversed and the cause remanded, with instructions to the district court to enter a decree dismissing the petition of plaintiff and the cross-petition of the defendant, Mari Tollefsen Todok, and adjudging each and all of the mortgages and conveyances in suit valid and enforceable.

Reversed.

[fol. 99] Petition and brief for rehearing, covering 24 pages, filed March 29, 1929, omitted from this print. It was denied and nothing more by order June 29, 1929.

[fol. 100] In Supreme Court of Nebraska

[Title omitted]

Order Denying Rehearing—June 29, 1929

This cause coming on to be heard upon motion of appellees Knute C. Engen and Mari Tollefsen Todok for a rehearing herin, was submitted to the court; upon due consideration whereof, the court finds no probable error in the judgment of this court heretofore entered herein. It is, therefore, ordered and adjudged that said motion for re-

hearing be, and hereby is, overruel and a rehearing herein denied.

Charles A. Goss, Chief Justice.

[fol. 101] IN SUPREME COURT OF NEBRASKA

[Title omitted]

AMENDED PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Aug. 21, 1929

To the Clerk of the Supreme Court of the State of Nebraska:

You will please prepare a record properly certified in the above entitled cause to be filed with an Application for Writ of Certiorari in the Supreme Court of the United States. Said certified record shall include the following:

1. Amended Petition, pages 27-51 inclusive.
2. Amendment to Amended Petition, pages 56 and 57.
3. Answer and Cross-Petition of First Trust Company, Lincoln, pages 60-67 inclusive.
4. Answer of other defendants, pages 68-72 inclusive.
5. Amended Reply of plaintiff, pages 75 to 78 inclusive.
6. Answer and Cross-petition of Mari Tollefsen Todok, pages 79 to 83 inclusive.
7. Reply to Answer of Mari Tollefsen Todok, page 85.
8. Answer to Cross-petition of Todok, pages 86 and 87.
9. Answer of First Trust Company, Lincoln, pages 90-92 inclusive.
10. Reply of Todok, pages 95 to 97 inclusive.
11. Journal Entry and Decree, pages 111 to 117 inclusive.
12. Opinion and judgment of the Supreme Court of Nebraska.

[fol. 102] 13. Motion for Rehearing by plaintiff.

14. Motion for Rehearing by Todok.

15. Journal Entry of the Supreme Court overruling Motion for Rehearing.

16. Testimony of Erick K. Engen, Questions and answers, 1124-1132; Questions and Answers 1137-1140; Questions and Answers 1142-1162; Questions and Answers 1164-1165; Questions and Answer 1168; Questions and Answers 1171-1178; Questions and Answers 1180-1222; Questions

and Answers 1235-1247; Questions and Answer 1354; Question and Answer 1356; Questions and Answers 2874-78; Questions and Answers 2881-2890; Questions and Answers 2893-2938.

17. Testimony of Mrs. Bertha Megrue: Questions and Answers 222-257; Questions and Answers 273-278; Questions and Answers 292-310; Questions and Answers 384-389; Questions and Answers 392-394; Questions and Answers 1358-1368.

18. Testimony of Leroy A. Megrue: Questions and Answers 563-583; Questions and Answers 590-602; Questions and Answers 625-628; Questions and Answers 1369-1375.

19. Exhibit "A" page 341.

20. Exhibit "C" page 344.

21. Exhibit "D" page 346.

22. Treaty of Amity & Commerce between the United States and Sweden, page 307 up to Article 1.

23. Article 6 of said Treaty, page 308.

24. Amended Præcipe.

Knute C. Engen and Mari To*ff*efson Todok, Petitioners, by H. G. Wellensick, F. E. Edgerton, Their Attorneys.

[fol. 103] Aurora, Nebraska, August 13, 1929.

The Defendants, Union State Bank of Harvard, Nebraska, a corporation, Robert E. Brown and Anna S. Brown, H. G. Thomas, Administrator of the Estate of Christian Knudson, deceased, Theodore Griess, Van E. Peterson, as Receiver of the Union State Bank of Harvard, Nebraska, State Bank of Harvard, Nebraska, and the First Trust Company of Lincoln, Nebraska, hereby acknowledge receipt and service of the foregoing prœcipe.

Butler & James, Hall, Cline & Williams, and J. H. Grosvenor, Attorneys for said Defendants, by J. H. Grosvenor.

[File endorsement omitted.]

[fol. 104] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 21, 1929

The petition herein for a writ of certiorari to the Supreme Court of the State of Nebraska is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(172)

FILE COPY

SEP 20 1929

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 412

MARI TOLLEFSEN TODOK AND KNUTE C. ENGEN, PETITIONERS,

vs.

UNION STATE BANK OF HARVARD, NEBRASKA, A CORPORATION; LEROY A. MEGRUE AND BERTHA M. MEGRUE, ROBERT E. BROWN AND ANNA S. BROWN, H. G. THOMAS, ADMINISTRATOR OF THE ESTATE OF CHRISTIAN KNUDSON, DECEASED; THEODORE GRIESS, VAN E. PETERSON, AS RECEIVER OF THE UNION STATE BANK OF HARVARD, NEBRASKA; NEBRASKA STATE BANK OF HARVARD, NEBRASKA, AND THE FIRST TRUST COMPANY OF LINCOLN, NEBRASKA, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA AND BRIEF IN SUPPORT THEREOF.

FRANK E. EDGERTON,
H. G. WELLENSIEK,
C. C. FRAIZER,
NORRIS BROWN,
Counsel for Petitioners.

(34,543)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 412

MARI TOLLEFSEN TODOK AND KNUTE C. ENGEN, PETITIONERS,

vs.

UNION STATE BANK OF HARVARD, NEBRASKA, A CORPORATION; LEROY A. MEGRUE AND BERTHA M. MEGRUE, ROBERT E. BROWN AND ANNA S. BROWN, H. G. THOMAS, ADMINISTRATOR OF THE ESTATE OF CHRISTIAN KNUDSON, DECEASED; THEODORE GRIESS, VAN E. PETERSON, AS RECEIVER OF THE UNION STATE BANK OF HARVARD, NEBRASKA; NEBRASKA STATE BANK OF HARVARD, NEBRASKA, AND THE FIRST TRUST COMPANY OF LINCOLN, NEBRASKA, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Mari Tollefsen Todok and Knute C. Engen respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

1. That petitioners are the widow and the son of Christian Knudson, deceased, sometimes known as Christian Engen, a citizen of Norway, who resided in Nebraska from 1878 until his death intestate August 6, 1923.

2. That the petitioner Mari Tollefsen Todok was the lawfully wedded wife of said Christian Knudson and a citizen of Norway and at all times has resided and still resides in the Kingdom of Norway; that the son of said Christian Knudson and said Mari Tollefsen Todok, the petitioner Knute C. Engen, is a citizen of the United States, residing in Seattle, Washington.

3. That this action was originally brought in the District Court of Hamilton County, Nebraska, July 25, 1925, to quist title in the petitioner Knute C. Engen to the 160-acre homestead of said Christian Knudson, deceased, he having in his lifetime deeded away this homestead to respondents without the signature and acknowledgment of the petitioner Mari Tollefsen Todok, his lawful wife, as required by the laws of the State of Nebraska.

4. That the petitioner Mari Tollefsen Todok filed a cross-petition asking that title to half of the homestead of her husband be quieted in her.

5. That the trial court held said land to be his homestead and held said deeds to his homestead void under

the Nebraska law because not signed and acknowledged by the wife of said decedent, the petitioner Todok herein.

6. That *Section* 2819 *Comp. St. Nebr.* 1922, provides and did provide during all the years this homestead was owned by Christian Knudson as follows:

> "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife."

That *Section* 2832, *Comp. St. Nebr.*, 1922, provided on August 6, 1923, the date of Knudson's death, as follows:

> "If the homestead was selected from the separate property of either husband or wife, it vests, on the death of the person from whose property it was selected, in the survivor for life, and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will."

That from 1875 to 1920, Art. 1, Sec. 25, of the State Constitution of Nebraska provided:

> "No distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment or descent of property."

7. That the Supreme Court of the State of Nebraska reversed said decision of the trial court on the sole

ground that the Treaty between United States and Norway gave to citizens of Norway owning property in Nebraska the unlimited, unrestricted and unqualified right to "freely dispose" of real estate owned in Nebraska by them, and that under said Treaty as it was construed and applied by said Nebraska Supreme Court it was not necessary for citizens of Norway to comply with the provisions of the Nebraska law in conveying homesteads in Nebraska *Engen* v. *Union State Bank*, 223 N. W. 664).

8. That the Treaty of Norway so far as same is involved in said construction is as follows:

> "The subjects of the contracting parties in the respective states may freely dispose of their goods and effects either by testament donation or otherwise in favor of such persons as they think proper; and their heirs in whatever place they shall reside shall receive the succession even *ab intestato*, either in person or by their Attorney." Section 6 of said Treaty.

9. That Christian Knudson was born in Norway January 10, 1845, and removed to America June 22, 1868; that he married the petitioner Mari Tollefsen Todok in 1867, and Knute C. Engen, their son and petitioner herein, was born January 19, 1869, and came to America in 1893.

10. That said Knudson left in Norway his wife, the petitioner, who, in January of 1869, gave birth to his son, the petitioner, Knute C. Engen, and that neither Knudson nor his wife, the petitioner herein, ever secured a divorce and she remained in Norway and he in

America and he did not complete his naturalization papers and did not become an American citizen, merely having taken out his first papers.

11. That in May, 1886, Knudson bought the 160 acres of land in controversy and established his homestead thereon with his aged dependent father and mother, whom he continued to support on said homestead until their deaths in 1900 and 1906; and thereafter he continued to reside upon said homestead, never deserting same.

12. That on July 17, 1923, Christian Knudson, blind and decrepit, signed the deeds in question by mark, conveying his homestead to nephews and nieces who were heavily indebted to the Union State Bank of Harvard, Nebraska; that the deeds were signed by mark with no person present but officers, directors and Attorney of the Bank.

13. That without the signature and acknowledgment of Knudson's lawful wife, the petitioner herein, Mari Tollefsen Todok, a citizen of Norway, these deeds were absolutely void under Nebraska law unless the Treaty with Norway validated them and permitted Knudson as a citizen of Norway to convey his homestead without complying with the Nebraska law.

14. That the County Court of Hamilton County, Nebraska, having exclusive jurisdiction, found that the petitioners herein were the sole and only heirs of Christian Knudson, deceased.

15. That the District Court of Hamilton County, Nebraska, the trial court, sustained the prayer of the

petitioners and quieted their title in this property on the sole ground that the deeds of Christian Knudson to his homestead were void under Nebraska law because not signed and acknowledged by his wife; that appeal was then duly taken to the Supreme Court of Nebraska.

16. That reversal was decreed in the Supreme Court of Nebraska on February 21, 1929, and Motion for Rehearing was overruled June 29, 1929, in said court, the sole ground of reversal being that Sec. 6 of the Treaty with Norway is repugnant to state statutes dealing with homestead conveyance (Secs. 2819 and 2832, Comp. St. Nebr., 1922).

B.

Reasons Relied on for the Allowance of the Writ.

1. The decision of the Supreme Court of Nebraska is erroneous in that it construes and applies the Treaty between the United States and Norway so as to give a citizen of Norway, residing in Nebraska, the right to convey real property owned by him in Nebraska, contrary to the laws of Nebraska.

2. The decision of the Supreme Court of Nebraska construes and applies said Treaty so as to deprive these petitioners of their right and title to the land in question, which they inherited under the laws of Nebraska, and they were entitled to the ownership thereof under the reasonable and proper construction of said Treaty with Norway.

3. The decision construes and applies said Treaty so that it violates the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States.

4. The decision construes and applies said Treaty so as to give to an alien greater rights over his homestead property in Nebraska than an American citizen has ever his homestead property.

5. The true purpose of the Treaty is to place citizens of Norway and citizens of the United States on an equality in the sale and transfer of their real estate. The decision of the Supreme Court of Nebraska creates inequality, giving a Norwegian alien greater rights, privileges and immunities than have citizens of Nebraska.

6. The decision deprives the petitioners of their property without due process of law.

WHEREFORE your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of of this Honorable Court, directed to the Supreme Court of the State of Nebraska, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its Docket No. 26236, *Knute C. Engen, Appellee, v. Union State Bank of Harvard, Nebraska, et al., Appellants,* and *Mari Tollefsen Todok, Appellee,* and that the said judgment of the Supreme Court of

Nebraska may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this court may seem meet and just; and your petitioners will ever pray.

MARI TOLLEFSEN TODOK,
KNUTE C. ENGEN,
By FRANK E. EDGERTON,
H. G. WELLENSICK,
C. C. FRAZIER,
NORRIS BROWN,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 412

MARI TOLLEFSEN TODOK AND KNUTE C. ENGEN, PETITIONERS,

VS.

UNION STATE BANK OF HARVARD, HARVARD, NEBRASKA, ET AL.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion in the Supreme Court of Nebraska is reported in *Engen* v. *Union State Bank*, — Nebraska, —, 223 N. W. 664. It is also found in the printed record, pages 90 to 98.

The opinion of the District Court of Hamilton County, Nebraska, the trial court, is the journal entry and decree and found on pages 40 to 46 of the printed record.

II.

Jurisdiction.

1. The date of the judgment of the Supreme Court of Nebraska to be reviewed is February 21, 1929. A Motion for rehearing was filed within proper time and this Motion was denied on June 29, 1929 (R. 80).

2. The specific claims advanced and rulings made in the lower court, which are relied upon as the basis of the Supreme Court's jurisdiction, are the following:

(*a*) It is specifically claimed by the petitioners that this construction of the Treaty is erroneous and unnecessary; that the Treaty and the Nebraska Homestead Act are both legal and effective when the Treaty is properly construed; that the Treaty confers no greater rights upon the alien and grants him no greater favors, immunities or privileges than it does to the citizens and that, therefore, the alien and the citizen being on an equality in the conveyance of the homestead, because of this removal of the limitations of alienage by the Treaty, the homestead act is effective in the transfer and conveyance of every homestead whether that of a citizen or an alien.

(*b*) The specific claim is then, that Christian Knudson buying his land in Nebraska and establishing his homestead thereon was by reason

of this Treaty and the provisions of the Nebraska Constitution placed on an absolute equality with citizens of the United States owning homesteads in Nebraska, but that the Treaty did not give him the unqualified right to transfer it by any means he saw fit. It is the specific claim of the petitioners that he stood, so far as the homestead is concerned, precisely on an equality with native Nebraskans and that he had no greater privileges or immunities with reference to the conveyance of that homestead.

(*c*) The specific claim is made that there has been drawn in question the construction and application of a Treaty and the validity of the Statutes of Nebraska on the ground that it is repugnant to the Treaty with Norway and that the title of these petitioners to this land is claimed under the Treaty with Norway properly construed and under the Statutes of the State of Nebraska, and that by reason thereof this court has jurisdiction.

(*d*) Rulings of Supreme Court of Nebraska declaring Homestead Law inoperative, thereby depriving petitioners of their titles to Homestead of Christian Knudson.

1. "The provisions of the homestead act (Com. St. 1922, 2816-2832), operating as restraints on alienation, are, to that extent, repugnant to, and inconsistent with, the rights guaranteed by terms of this Treaty (8 Stat. 64, Art. 6), stipulating that "the subjects of the contracting parties in the respective states, may freely dispose of their goods and effects ("*fonds et biens*") either by testament, donation or otherwise, in favor of such persons as they think proper."

2. "As to conveyances of real estate authorized by such Treaty, even though consisting of the dwelling house in which the grantor resides and its appurtenances, and the land on which it is situated, the restraints on alienation imposed by such Homestead Act are to that extent inoperative."

3. "On the contrary this instrument (the treaty with Norway) expressly stipulates for conferring upon the "subjects of the contracting parties in the respective states" the unlimited, unrestricted and unqualified right to "freely dispose" of their goods and effects ("*fonds et biens*"), either by testament, donation or otherwise (which necessarily include the right to convey by deed), in favor of such persons as they think proper." This, in legal effect, is wholly inconsistent with the right of dower, and, in like manner, inconsistent with the existence of statutory right of homestead, in real estate to which the Treaty applies."

4. "The Statutory provisions referred to (thus require a deed to homestead to be signed and acknowledged by both husband and wife), thus assume the nature of limitations, qualifications or modifications of the treaty itself, and, if valid, would necessarily change its true construction. Each of these provisions of the legislative enactment must therefore be considered to be *pro tanto* inconsistent with the terms of the controlling treaty properly construed. The conclusion follows that, to the extent inconsistent with the terms of the Treaty the statutory provisions are inoperative."

5. "Therefore, the legal effect of the conveyances executed by Christian Knudson must be

determined wholly by the powers conferred on him by Treaty, and not by the inconsistent limitations and restrictions prescribed in the Nebraska Homestead Act (Com. St. 1922, 2816-2832)."

6. "So considered, the validity of these conveyances cannot be questioned and they are each effective in vesting the titles to the lands described therein to the grantees therein named."

3. The Supreme Court of the United States has jurisdiction of this matter. Judicial Code, Sec. 237 B as amended February 13, 1925, 43 Stat. 936.

4. The following cases sustain the jurisdiction of the Supreme Court:

Larkin v. *Pough*, 276 U. S. 431; 48 S. Ct. 366.
Ireland v. *Woods*, 246 U. S. 323; 38 S. Ct. 319.

III.

Statement of the Case.

The petitioners were the wife and son of Christian Knudson, a citizen of Norway, who owned land and lived in Nebraska from 1878 to August 6, 1923, the date of his death.

Christian Knudson married the petitioner Mari Tollefsen Todok in Norway in 1867, and he came to the United States in 1868 leaving her in Norway, and the petitioner Engen was born in January, 1869, being a son of Christian Knudson and the petitioner Todok, and the issue of a lawful marriage. Knudson settled

in Nebraska in 1878 on the 160 acres in question in this suit and brought there his aged dependent father and mother, who lived with him there on the place until their deaths in 1900 and 1906. It was thus his homestead under the Nebraska law because he was a married man and because he had living with him on this place his aged dependent father and mother (Compiled St. of Neb., 1922, Secs. 2816-2830).

Knudson never became a citizen of America. He took out his first papers, but never completed his naturalization. In the later years of his life he became almost blind, but never abandoned his homestead. This was definitely found by the trial Judge (R. 40 to 46). The Supreme Court of Nebraska assumes it to be true.

On July 17, 1923, Christian Knudson, prior to his death on August 6, 1923, by mark, attempted to execute deeds to the 160 acres which was his homestead. These deeds were not signed and executed by his wife, the petitioner Todok, as required by Compiled Statutes of Nebraska, 1922, Sec. 2819.

After his death his widow and son, petitioners herein, brought this action to set aside these deeds and all subsequent conveyances on the ground that the deed of the homestead in Nebraska without the signature and acknowledgment of both husband and wife is void.

The trial court so found and set aside these deeds and all other conveyances.

The Supreme Court of Nebraska in its decision held that this positive statement of the law that the homestead cannot be conveyed unless the deed is signed and acknowledged by both husband and wife is repugnant

to Section 6 of the Treaty with Norway, which provides that the citizens of the contracting parties may "freely dispose" of their goods and effects.

It will thus be seen that there is just one question, and that is this: Does the Treaty with Norway give to Christian Knudson and other Norwegian citizens in Nebraska the right to so dispose of homestead property as to deprive their widows and sons of their statutory rights in that homestead?

It is the contention of the petitioners that Section 6 of the Treaty properly construed merely removed the restriction of alienage from Knudson and gave him the same rights, privileges and immunities in the transfer of his homestead property in Nebraska as any citizen would have.

Consequently, if that is the proper construction, then the Treaty and the Homestead Act of Nebraska operate side by side, each being legal and enforceable. If that construction obtains, then the widow and son of Knudson retain their right and title to the property of their husband and father because his attempted conveyance contrary to statutory law was void.

IV.

Specifications of Errors.

1. The Nebraska Supreme Court erred in finding and holding that Section 6 of the Treaty with Norway permits a Norwegian citizen in Nebraska to convey his homestead without the signature and acknowledgment of his wife, in violation of the Nebraska Homestead Act.

2. The Nebraska Supreme Court erred in finding and holding that the Treaty with Norway should be construed as giving a Norwegian citizen in Nebraska the unlimited, unrestricted and unqualified right to "freely dispose of his goods and effects" by deed, which construction is contrary to the Nebraska Statutes for the conveyance of homesteads and deprives these petitioners of their title to this land.

3. The Nebraska Supreme Court erred in finding and holding that the Nebraska Homestead Act (Comp. St. of 1922, Secs. 2816-2832) has limitations and restrictions which are inconsistent with the Treaty with Norway.

4. The Nebraska Supreme Court erred in finding and holding that the Nebraska Homestead Act is inoperative as to a citizen of Norway owning land in Nebraska.

5. The Supreme Court of Nebraska erred in finding and holding that the rights of petitioners as sole heirs of Christian Knudson are not protected by the Nebraska Homestead Act.

6. The Supreme Court of Nebraska erred in finding and holding that the Treaty between the United States and Norway gives a citizen of Norway owning land in Nebraska the unlimited, unrestricted and unqualified right to dispose of real estate in Nebraska without complying with the laws of conveyance of the State of Nebraska.

ARGUMENT.

Summary.

1. The decision of the Nebraska Supreme Court in construing the Treaty with Norway is contrary to and in conflict with federal and state decisions in holding that the Nebraska Homestead Act is repugnant to the Treaty. With reasonable interpretation, there is no conflict between the Treaty and the Homestead Act.

2. The Treaty with Norway was made to remove disabilities of alienage and to bring about equality and does not give to Norwegian aliens the right to convey real estate in Nebraska contrary to Nebraska law.

3. By holding that a Norwegian alien in Nebraska may convey his homestead contrary to Nebraska law, the Nebraska decision so construes and applies the Treaty with Norway that petitioners are deprived of their property without due process of law and are denied the equal protection of the law.

ARGUMENT.

The Treaty With Norway Does Not Conflict With the Nebraska Homestead Act.

The Supreme Court of Nebraska in its decision in this case holds that the Nebraska Homestead Act, which prohibits the conveyance of the homestead without signature and acknowledgment by both husband

and wife, is inconsistent with the rights guaranteed to citizens of Norway by terms of the Treaty.

The entire case hinges upon this interpretation of the Treaty with Norway. It is not questioned that Treaties are the Supreme law of the land and binding upon all courts in the Nation, and that it is the duty of a State court to enforce Treaty rights of aliens without regard to conflicting statutory provisions of the State.

The argument of the Supreme Court of Nebraska may be summed up as follows:

1. Christian Knudson was a resident alien of Nebraska, being a citizen of the Kingdom of Norway and this land was his homestead.

2. The Treaty between Norway and the United States provides that the citizens of Norway in the United States "may freely dispose of their goods and effects either by testament, donation or otherwise."

3. The Nebraska Court has already held that "goods and effects" include real estate. *Erickson* v. *Carlson*, 95 Neb. 182.

4. The Treaty is the Supreme law of the land.

5. The Nebraska Homestead Act, which provides that homesteads cannot be conveyed without the signature and acknowledgment of both husband and wife, is inconsistent with the terms of this Treaty because "freely dispose" means that the alien husband has a right to convey without being joined by his wife.

6. Therefore the Homestead Act, being inconsistent with the Treaty, is inoperative and a Norwegian alien

in Nebraska may himself by deed convey his homestead without his wife joining and his separate deed is valid because of the provisions of the Treaty with Norway.

This is the logic and reasoning used by the Supreme Court of Nebraska and by this reasoning the petitioners, the widow and son of Christian Knudson, are deprived of their legal rights to which they are entitled under the homestead law of Nebraska, and, we say, under the Treaty with Norway.

It is without dispute that this land was the homestead of a subject of Norway residing in Nebraska, and it is without dispute that the Nebraska court has held in *Erickson* v. *Carlson*, 95 Neb. 182, that "goods and effects" described in the Treaty with Norway include real estate in Nebraska.

The decision here then turns on the proper construction of the following words in the Treaty with Norway:

> "Freely dispose of their goods and effects either by testament, donation or otherwise in favor of such persons as they think proper."

It is elementary that where the fair interpretation of a Treaty will allow a State Statute to remain in effect, that interpretation will be adopted by the Courts. *Terrace* v. *Thompson*, 263 U. S. 197; 44 S. Ct. 15.

It is also elementary that where a Treaty admits of two constructions the one will be adopted which permits a State law to be operative. It is elementary that the courts will not find unconstitutional or render inoperative a state law where a Treaty is called in

question unless the Treaty specifically and clearly nullifies the state law. *Terrace* v. *Thompson, supra;*

It is elementary that Treaties may receive a fair interpretation according to the intention of the contracting parties and they must be so interpreted as to carry out their manifest purpose. *Wright* v. *Henkel,* 190 U. S. 40; 20 S. Ct. 78.

It is not for the courts to make the construction of a Treaty broader than the apparent intent and purpose of its language. *The Santissima Trinidad,* 7 Wheat. 283; *Terrace* v. *Thompson, supra.*

Where a Treaty might be construed in different ways a liberal fair construction which will leave unchanged State Statutes is to be preferred. *Hauenstein* v. *Lyndham,* 100 U. S. 483; *Asakura* v. *Seattle,* 265 U. S. 332; 44 S. Ct. 515.

Cobbitt, in *Leading Cases,* in International law, Vol. 1, p. 346, says:

> 1. "In the interpretation of international agreements, it is necessary in view of the different character of interests involved and the different conditions under which such agreements are commonly entered into, to adopt a more liberal method of construction than that which might fairly be applied in the case of private instruments. That is, a treaty must be construed throughout in the light of the larger national intents with which it deals and in view of the effect, which a particular construction, even though it may be a plain and literal construction, would have on them. (Westlake 1, 282.)"

2. "All international agreements must be construed in such a way as not to derogate from the fundamental principles of international law; or even from the fundamental rights of states except in so far as a contrary intention is explicitly manifested. In general, the words used must be construed in their plain and ordinary sense, save when they profess some 'customary' or 'special' meaning within the knowledge and contemplation of the parties."

A study of the Treaty between the United States and Sweden in 1783, which became the Treaty with Sweden and Norway in 1826, and is now effective as to Norway, clearly shows that neither country intended to interfere with the rights of their respective states to fully carry out political and economic equality between their citizens and the citizens of the other contracting party. It is stated in the beginning that the Treaty is a basis for avoiding "those burdensome preferences which are the usual sources of debate, embarrassment and discontent and by leaving each party at liberty to make, respecting navigation and commerce, those regulations which shall be most convenient to itself."

When nations enter into Treaties with each other, it is never the intention of one nation to give to the subjects of another nation greater rights, privileges or immunities than its own citizens enjoy. The idea always is to remove the disabilities of aliens and give the alien the right to stand on an equality with the citizen. In other words, it is to remove those burdensome preferences which are found in favor of a citizen against an

alien. The principle is stated by Chief Justice White in *Peterson* v. *Iowa*, 245 U. S. 170; 38 S. Ct. 109, in the following language:

> "In other words, the right of the citizens of each of the contracting countries reciprocally to own, dispose of or transmit their property situated in the other country, free from provisions or restrictions discriminating because of alienage, is in the largest possible sense that which is protected by the Treaty. And conversely this being true it follows also that the Treaty did not protect the citizens of either country to acquire by transfer or inheritance property situated in the other belonging to its own citizens free from the restraints imposed by the law of such country on its own citizens even although such restraints would not have been applicable in case the property had been disposed of or transmitted to a citizen."

It is clear that the proper meaning of the words "freely dispose" in the Treaty between Norway and the United States is that the citizens of Norway residing in America and owning property in America *were to be freed from the disabilities of alienage.* It is clear that the United States was not, in this treaty, granting to Norwegian aliens in America greater rights, privileges and immunities than are granted to American citizens.

If the interpretation of the Nebraska Supreme Court of Section 6 of the Treaty with Norway is correct, then a Norwegian alien in Nebraska may dispose of his real estate by simply handing to his grantee a piece of turf,

as conveyance was made in olden times. Or he may without a scrap of writing establish an express trust in the land, something which is also prohibited by the Nebraska Statutes. Or he may "freely dispose" of this real property by renting it for illegal purposes, such as a saloon or a nuisance of some kind and yet be protected by the Treaty with Nebraska laws inoperative if the Nebraska court properly construes and applies section 6 of the Treaty.

Throughout all of the history of Nebraska the Statutory prohibition against the conveyance of the homestead without the deed being signed and acknowledged by both husband and wife has been sustained and deeds of the homestead without complying with the Statutes are void and not merely voidable.

Ambler v. *Jones,* 102 Neb. 40; 165 N. W. 886;
Buettgenbach v. *Gerbig,* 2 Unof. 889; 90 N. W. 654;
Nat'l Bank v. *Chamberlain,* 72 Neb. 469; 100 N. W. 943;
Frank v. *Bell,* 52 Neb. 57; N. W. 984;
Whitlock v. *Gosson,* 35 Neb. 829; 53 N. W. 980;
Holyoke v. *Bishop,* 86 Neb. 490; 125 N. W. 1093;
Anderson v. Cusack, 115 Neb. 643.

Knudson occupied this land in 1878 and held it during all of the years of his life with the homestead exemption. He lived and died enjoying all of the rights, privileges and immunities of a citizen of Nebraska except the right to vote. He stood on an equality with other citizens and had the sheriff with an execution sought to sell his land the law of the home-

stead exemption would have stepped in to protect him.

He could not have these benefits of the homestead act without its burdens. He could not expect to enjoy its exemption and be free from the State's ruling that the homestead could not be conveyed without the wife joining in the deed of conveyance. The provisions of the Treaty which are interpreted and applied by the Nebraska Supreme Court, when fairly construed, mean that a resident alien Norwegian citizen in the United States is free from the restraints and disabilities of alienage so far as his property is concerned. It means that he can "freely dispose of his goods and effects" just the same and in the same manner as a citizen. Since the Nebraska Court has held that "goods and effects" include real estate, the Treaty means that the Norwegian alien can convey his real estate subject to the same laws as a Nebraska citizen. This construction of the Treaty is reasonable, just, probable, natural and liberal. It meets the requirements of all the authorities.

It is elementary that written instruments to convey the title to real estate must conform to the law of the state or country where the land is situated. *Kirkendall* v. *Weatherly*, 77 Neb. 42; 109 N. W. 757; 9 L. R. A. (N. S.) 515; *United States* v. *Fox*, 94 U. S. 315; *Story, Conflict of Laws*, 8th ed., Sec. 435, citing *United States* v. *Crosby*, 7 Cranch 115; *Kearn* v. *Moon*, 9 Wheat. 566; *McCormick* v. *Sullivant*, 10 Wheat. 192; *Darby* v. *Mayer*, 10 Wheat. 465.

The Nebraska Court has also held that the homestead exemption obtains in Nebraska, whether the oc-

cupant of the homestead is an alien or a citizen. *People* v. *McClay*, 2 Neb. 9.

The Nebraska constitution from 1875 up to its change in 1920 provided that "no distinction shall ever be made by law between aliens and citizens in reference to the possession, enjoyment or descent of property. Sec. 25, Art. 1, *Constitution of Nebraska*, 1875.

It will be seen that the fair and reasonable construction of the Treaty with Norway does not render inoperative the Homestead laws of Nebraska and does not deprive the widow and son of Knudson of their right and title to this real estate.

The treaty removed the disabilities of alienage and placed Knudson on an equal footing with other homestead owners in Nebraska.

The Treaty with Norway Grants Equality Between Norwegian Aliens and Citizens and No More.

In *Re Stixrud*, 58 Wash. 339; 109 Pac. 343; 33 L. R. A. (N. S.) 632, this same treaty was under consideration. The court finds in Section 6 a contract between the nations which shall put all citizens on the same basis.

This section was discussed by the court as follows:

> "It, of course, cannot be seriously contended that citizens of Sweden and Norway are, by the terms of this Treaty, accorded any greater rights in their succession to property than the general laws of the states of the Union may accord to citizens of the United States. The laws of the several states would undoubtedly control those rights, even though no reservation to that

effect was in the treaty. To whatever extent the right or privilege of a citizen of the United States to take property by testament or inheritance is impaired by our own laws, whether such laws relate to taxation or succession, to that extent will the rights of the citizens of Norway and Sweden be impaired, without violating the terms or spirit of this treaty. The language of the treaty giving the citizens of the contracting parties the right to dispose of their goods and effects by testament, and the right to receive the succession, must mean the right to so give and receive as such right may be defined by the general laws in force in the country where the property is situated. It could not mean otherwise, because there is no law to which we may turn, or which the contracting parties could have in view, in the making of the treaty, defining testamentary and succession rights, save the laws of the respective countries. There is no universal or international law of succession to property. In order then to give force and effect to the treaty, and avoid the destruction of the very end it was plainly intended to accomplish, we must conclude that the testamentary and inheritance rights secured thereby are such that they cannot be impaired except as such rights and privileges of citizens may be impaired by the laws of their own country."

In *Rocco* v. *Thompson*, 157 Cal. 552; 108, p. 516; 37 L. R. A. (N. S.) 549, where the Italian Consul claimed the right to administer the estate of a deceased Italian citizen in California, the favored-nation clause of the Treaty gave the Consul the right to "intervene in the

possession, administration and judicial liquidation of the estate of the deceased."

The California Court said this did not render inoperative the probate laws of the States.

The Court said:

> "It is also of grave importance because its solution in favor of the appellant necessarily ascribes to the Federal Government the intent, by means of the Treaty making power, to naturally abridge the autonomy of the several states and to interfere with and direct the state tribunals in proceedings affecting private property within their jurisdictions. It is obvious that such intent is not to be lightly imputed to the Federal government, and that it cannot be allowed to exist except where the language used in the treaty plainly expresses it, or necessarily implies it."

Rocca v. *Thompson, supra,* was affirmed in the Supreme Court, 223 U. S. 317; 32 S. Ct. 207. The court held that the treaty does not specifically give to the foreign consul the right to appointment as administrator and, therefore, the state law prevails.

In *The Aimable Isabella,* 6 Wheat. 1, the court held that courts will not alter, amend or add to a treaty by inserting any clause, small or great, any more than in a law.

In *Duus* v. *Brown,* 245 176, 38 S. Ct. 111, the court, construing Sec. 6 of the Treaty, held that it "by its text *embraces and protects from discrimination* only citizens or subjects of Sweden and their property in Iowa."

The Decision of the Supreme Court of Nebraska so Construes the Treaty with Norway that Petitioners are Deprived of Their Property Without Due Process of Law.

In 12 *C. J.*, 1195, the law is stated as follows:

> "The guarantees of due process of law extend to every governmental proceeding which may interfere with personal or property rights, whether the proceeding be legislative, judicial, administrative or executive, and relates especially to that class of rights the protection of which is peculiarly within the province of the judicial branch of the government."

The Fifth Amendment to the Federal Constitution provides that

> "no person shall • • • be deprived of life, liberty or property without due process of law."

By its unusual construction and application of the language of the Treaty with Norway, the Supreme Court of Nebraska deprives these petitioners of their property rights in this homestead without due process of law.

The petitioners contend that by every known and accepted rule of treaty construction this treaty gives to these petitioners their property. The nations entering into this treaty meant that their citizens should be placed on an equality with citizens of the other. They did not intend that the citizens of one nation should, in the other country, have greater rights and privileges than the citizens of that country.

We are not contending that the Treaty deprives petitioners of rights guaranteed by the Constitution. We do contend that the Nebraska Supreme Court construction and application of the Treaty does this very thing.

In other words, by this decision the Treaty is made to mean what it was not intended to mean and thereby petitioners are deprived of their property without a chance to be heard; without the regular forms of law in Nebraska dealing with a homestead being complied with.

The petitioners, as widow and son of Christian Knudson, have a property right in his homestead. The Supreme Court of Nebraska by judicial legislation adds to the treaty with Norway the words "the unlimited, unrestricted and unqualified right" to dispose of homestead property in Nebraska. With that construction, the treaty violates the constitutional prohibition in the Fifth Amendment to the Federal Constitution.

In *Hubbard* v. *Hubbard*, 77 Vt. 73; 2 Ann. Cas. 315, the court held:

> "No. 49 of the Acts of 1896, providing that the court of chancery, in its discretion, upon the petition of a married woman, may empower her to convey her real estate by separate deed as effectually as if the deed were executed by herself and her husband, is unconstitutional as depriving the husband of his property without due process of law, the exercise of the power conferred upon the court not being made to depend upon any proof of any prescribed facts but being left to the arbitrary and unregulated will of the court."

In the instant case, the Nebraska Court's unusual construction of the Treaty causes the Treaty to deprive petitioners of their property by giving to Knudson a right of disposition of homestead property prohibited by the State law under which he held title.

Due process of law called for a deed signed by both Knudson and petitioner Todok before petitioners would be deprived of their property rights.

The Decision of the Nebraska Court Denies Petitioners the Equal Protection of the Law.

The State of Nebraska, speaking through its highest court, has construed and applied the treaty with Norway so that the Treaty denies to these petitioners the equal protection of the law.

Any other widow and son in Nebraska have their property rights in a homestead protected from the single conveyance of husband and father.

Suppose Erick K. Engen, brother of Christian Knudson, should by deed convey his homestead without being joined by his wife. Upon his death, his wife and son could recover the title, because his deed was void. Erick K. Engen is a citizen of the United States. His brother Christian Knudson had a homestead just across the road. He conveyed it by deed signed by himself alone. The Supreme Court of Nebraska says in this decision he could do this because he was a Norwegian citizen and his wife and son have lost their interest in that homestead.

The wife and son of Christian Knudson are thus denied the equal protection of the law. This denial

rests in the erroneous construction of this treaty by the highest court of Nebraska.

The decision, therefore, violates the Fourteenth Amendment to the Federal Constitution.

> "While statements are lacking as to the equality of treatment which the executive and judicial departments must give in enforcing the laws of a State, it is certain that an intentional discrimination is forbidden." 12 *C. J.*, 1144.

The erroneous decision of the Nebraska Supreme Court has brought about a situation of discrimination against the widows and heirs of citizens of Norway owning real estate in Nebraska. Their property rights, under this construction of the Treaty, are not given equal protection of the law. This discrimination is effected by the action of the judicial branch of the State government in this most unusual decision.

In other words, the Treaty, as the Supreme law of the land, is so construed and applied by the Nebraska Court that it amounts to an unconstitutional discrimination by the State itself. It violates the Fourteenth Amendment under the docrine of *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373; 6 S. Ct. 1064.

Conclusion.

We, therefore, respectfully submit that this case is one calling for the exercise by this Court of its supervisory powers, in order that a correct construction and application of the Treaty between Norway and the United States may be had and these petitioners may have protected their right and title to the homestead

property of their husband and father, which was never validly conveyed by him while living, and that to such an end a Writ of Certiorari should be granted and this Court should review the decision of the Nebraska Supreme Court and finally reverse it.

FRANK E. EDGERTON,
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NORRIS BROWN,
Counsel for Petitioners.

(9425)

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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1930

MARY TOLLEFSON TABOR AND EDITH G. ENGEL, PETITIONERS,

v.

UNION STATE BANK OF HARVARD, HARVARD, NEBRASKA, A CORPORATION; CARLOS A. ROBERTS AND REBECCA M. ROBERTS; ROBERT H. BROWN AND ANNA S. BROWN; H. G. WILLIAMS, ADMINISTRATOR OF THE ESTATE OF CHRISTIAN ANDERSON, DECEASED; EDWARD CARTER, VERA M. PETERSON, AS EXECUTRIX OF THE ESTATE OF CHARLES PETERSON, DECEASED; NEBRASKA STATE BANK OF HARVARD, NEBRASKA; NEBRASKA STATE BANK OF HARVARD, NEBRASKA; AND THE FIRST TRUST COMPANY OF LINCOLN, NEBRASKA, RESPONDENTS.

ADDITIONAL BRIEF OF PLAINTIFFS IN ERROR.

FRANK H. YOUNGLOVE,
H. G. WILLIAMS,
C. C. FRADENBURG,
ROBERT BROWN,
Counsel for Petitioners.

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Number 412.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1929.

MARIE TOLLEFSEN TODOK AND KNUTE C. ENGEN, PETITIONERS,

V.

UNION STATE BANK OF HARVARD, HARVARD, NEBRASKA, A CORPORATION; LEROY A. MEGRUE AND BERTHA M. MEGRUE, ROBERT E. BROWN AND ANNA S. BROWN, H. G. THOMAS, ADMINISTRATOR OF THE ESTATE OF CHRISTIAN KNUDSON, DECEASED; THEODORE GRIESS, VAN E. PETERSON, AS RECEIVER OF THE UNION STATE BANK OF HARVARD, NEBRASKA; NEBRASKA STATE BANK OF HARVARD, NEBRASKA, AND THE FIRST TRUST COMPANY OF LINCOLN, NEBRASKA, RESPONDENTS.

ADDITIONAL BRIEF OF PLAINTIFFS IN ERROR.

FRANK E. EDGERTON,
H. G. WELLENSIEK,
C. C. FRAIZER,
NORRIS BROWN,
Counsel for Petitioners.

STATEMENT.

The object in filing this additional brief on the part of the plaintiffs is to amplify the argument already pre-

sented in the brief in support of petition for writ of certiorari, which writ has been granted by the court.

This first brief was filed with the court September 20, 1929. The facts involved are briefly stated on pages 13, 14 and 15 in the former brief and will not be repeated here.

The sole question is the proper construction of the treaty between the United States and Norway. The District Court of Hamilton County, Nebraska, which tried the case, found that the land involved was the homestead of Christian Knudson and that he was a married man and that under the laws of Nebraska his deed executed alone, without his wife joining, was void.

The supreme court of Nebraska held that this Nebraska statute voiding such a deed is held in abeyance by the terms of the treaty between United States and Norway, wherein Norwegian aliens are granted the right to "freely dispose of their goods and effects."

The Supreme Court of Nebraska held that this treaty confers upon the Norwegian alien in Nebraska "the *unlimited, unrestricted and unqualified* right to freely dispose of his goods and effects."

It is the contention of the plaintiffs in error that the Supreme Court of Nebraska has thereby broadened and enlarged the language and scope of the treaty and that without such enlargement there would be no conflict between the treaty and the Nebraska homestead statute. In other words, the plaintiffs in error contend that there is no conflict between the treaty and the statute, and that the Nebraska statute is in full force and effect and that their property rights in the land in question

have never been lost through the deed to the homestead made by Christian Knudson without the joinder of his wife.

The argument of the Supreme Court of Nebraska in this case (*Engen* v. *Union State Bank, et al.*, 223 N. W. 664), is summarized in our former brief on pages 18 and 19.

It is the contention of the plaintiffs in error that *the treaty with Norway did nothing more than to remove the disabilities of alienage* and that an American and a Norwegian alien owning land in Nebraska are alike, subject to all of the laws of Nebraska, dealing with the conveyance of that land.

ARGUMENT.

I.

American citizens and Norwegian aliens owning land in Nebraska are placed on an equality by the treaty between the United States and Norway in so far as conveyance is concerned.

This treaty between United States and Norway is a contract between two nations and was entered into as a basis for avoiding "those burdensome preferences which are the usual sources of debate, embarrassment and discontent and by leaving each party at liberty to make, respecting navigation and commerce, those regulations which shall be most convenient to itself."

Treaties are, of course, the supreme law of the land. They are contracts which in utmost good faith should be carried out. The nations can not countenance the repudiation or abrogation of any part or portion of a treaty.

Treaties are made for the purpose of giving aliens a somewhat equal footing with citizens. No nation ever enters into a treaty for the purpose of giving aliens greater privileges, rights and immunities than its own citizens have in its own country.

Yet, if the construction of this treaty by the Supreme Court of Nebraska is a proper one, America has granted to Norwegian aliens in this country greater rights, privileges and immunities than American citizens have.

An American citizen owning a homestead in Nebraska cannot convey that homestead away from his wife and children. Under the Nebraska statute, as construed in authorities cited on page 23 of the former brief, a deed by a husband to a homestead without being joined by his wife is just a scrap of paper, nothing more. It has no validity.

Christian Knudson gave such a deed and the trial court held that it was void because, being a homestead, it did not meet the requirements of the Nebraska statute and decisions. The supreme court held that it was a valid deed because of the provisions of this treaty between the United States and Norway.

If there is a conflict between the treaty and the statute it must be an apparent one because it has frequently been held that

> "if under a proper construction of the treaty and the statute the latter can be given effect without violating the provisions of the treaty this should be done."
> 38 Cyc. 978.

In *Mariorano* v. *Baltimore, etc., R. Co.*, 213 U. S. 268, 29 S. Ct. 424, this principle was upheld. Here, the ad-

ministrator of the estate of a deceased Italian brought suit in the courts of Pennsylvania for damages. By the statutes of Pennsylvania, the right to recover damages for such death was conferred upon surviving relatives irrespective of their condition. However, the Pennsylvania court had held that the non-resident alien relatives of a deceased person did not have this right of action in the Pennsylvania courts.

The treaty between the United States and Italy gave to the citizens of each country the most constant protection and security for their property, and gave free access to the courts of justice in order to maintain their own rights.

The court in construing this treaty in conjunction with the Pennsylvania statutes and decisions said:

> "If an Italian subject, sojourning in this country, is himself given all the direct protection and security afforded by the laws to our own people, including all rights of actions for himself or his personal representatives to safeguard the protection and security, the treaty is fully complied with, without going further and giving to his non-resident alien relatives a right of action for damages for his death, although such action is afforded to native resident relatives, and although the existence of such an action may indirectly promote his safety."

So, in the instant case the Nebraska statute dealing with homesteads can stand squarely operative with a fair and reasonable construction of the treaty with Norway. It is not necessary to add to the treaty with Norway that the Norwegian alien in this country has the "*unlimited, unrestricted* and *unqualified*" right to freely dispose of his real estate. The treaty says that he may

"freely dispose" of his "goods and effects," which can mean nothing else than that he can freely dispose of them under the laws of the state in which it is located. Some courts and the State Department take the position that this does not include real estate.

In *Fredcrickson* v. *Louisana*, 23 How. 645, there was a construction of the treaty with Wurtenberg concerning the transfer and descent of personal property. The treaty provided:

> "The citizens or subjects of each of the contracting parties shall have the power to dispose of their personal property within the states of the other by testament donation or otherwise; and their heirs, legatees and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property and may take possession thereof and dispose of the same at their pleasure, paying such duties as the inhabitants of the country where the property lies shall be liable to pay in like cases."

The statute of Louisiana provided for a tax of 10 per cent as a succession tax. It was contended that this treaty with Wurtenberg was contrary to the provisions of the statute and, therefore, the statute was inoperative. The court held that the purpose of the treaty was to enable aliens to dispose of their property, paying such duties only as the inhabitants of the country where the property lies pay under like conditions. The court refuses to enlarge on the language of the treaty. The court says that the state statute treats citizens and aliens alike and no more could be expected.

The same thing was done in *Lehman* v. *State*, an Indiana case reported in 88 N. E. 365.

The general rule for construction of treaties and federal statutes is stated by this court in *Whitney* v. *Robertson*, 124 U. S. 190, 8 S. Ct. 456, in the following language:

> "When the two relate to the same subject the court will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either."

This same language is stated to be the law of construction of statutes and treaties in 15 R. C. L. 161. In *United States* v. *Gue Lim*, 176 U. S. 459, 20 S. Ct. 415, the court said:

> "We ought, therefore, to so construe the act if it can reasonably be done so as to further the execution and not to violate the provisions of the treaty."

In *Hempel* v. *Weedin*, 23 Fed. (2d) 949, the court said:

> "A statute and a treaty should, if possible, be construed so that both can stand together and be given effect."

While these quotations are from decisions construing federal statutes and treaties there seems to be no reason why the same ruling should not apply to a construction of a state's statute in conjunction with a treaty.

If a reasonable and proper construction of the treaty leaves the state statute operative, then that construction of the treaty should be accepted.

In *Terrace* v. *Thompson*, 263 U. S. 197, 44 S. Ct. 15, where there was an action brought to enjoin the enforcement of a state law on the ground that it was in conflict with a treaty, the court said that *the plaintiff has the burden of showing the conflict.* It held that to prevail

on this point *the plaintiff must show the conflict between the state act and the treaty* where the provisions of the treaty do not specifically include lease of agricultural land.

In that case, the treaty provided that Japanese aliens might "own or lease and occupy houses, warehouses and shops" or "to lease land for residential and commercial purposes," or "to do anything incident to or necessary for trade."

The court said that this language cannot be said to include the right to own or lease or to have any title to or interest in land *for agricultural purposes.*

The court refused to read into the treaty language not specifically contrary to the statute.

In general, the words used in a treaty must be construed in their plain and ordinary sense and when the words of this treaty with Norway are so construed *the treaty means that the alien owning land in Nebraska may freely dispose of his land in accordance with the provisions of Nebraska law.* It is a strained construction of the treaty which would give to the alien the right to convey his homestead property in Nebraska in a manner different from that in which a citizen could convey his homestead property.

Chief Justice White, in *Petersen* v. *Iowa,* 245 U. S. 170, 38 S. Ct. 109, 110, in construing a treaty with Denmark, said:

> "Indeed, that which is contracted against is merely a departure by discrimination by either one of the countries against the citizens of the other and their property therein from the legislation governing their

> own citizens. In other words, the right of the citizens of each of the contracting countries reciprocally to own, dispose of or transmit their property situated in the other country free from provisions or restrictions discriminating because of alienage is in the largest possible sense that which is protected by the treaty."

The 6th Article of the treaty with Norway concludes in this language:

> "The United States on their part, or any of them, shall be at liberty to make, respecting this matter, such laws as they think proper."

This is, we believe, applicable to all preceding language in the 6th Article and it strengthens the belief that state laws apply to the Norwegian alien and his property equally with a citizen. The Norwegian in Nebraska cannot hold and convey his property here except under Nebraska laws.

The Iowa court in *Re Peterson*, 151 N. W. 66, L. R. A. 1916 A, 469, speaking of a suggested construction of this treaty, says, in surprise:

> "Were we to give the treaty the broad significance claimed for it, it would give to subjects of the Kingdom of Sweden, whether residents or non-residents of this country, greater rights in the property of an intestate than are possessed by our own citizens."

In this same case in the Supreme Court of the United States (*Duus* v. *Brown*, 245 U. S. 176, 38 S. Ct. 111), this court in the syllabus said that Sec. 6 of the treaty "*by its terms embraces and protects from discrimination* only citizens or subjects of Sweden and their property in Iowa."

The Washington court in *Re Stixrud*, 58 Wash. 343, 109 Pac. 343, 33 L. R. A. (N. S.) 632, says it cannot be seriously contended that citizens of Norway are, under this treaty, accorded greater rights than citizens of the United States.

> "The language of the treaty giving the citizens of the contracting parties the right to dispose of their goods and effects," says the court, "must mean the right to so give as such right may be defined by the general laws in force in the country where the property is situated."

Indeed, what other reasonable construction of the treaty can there be?

Knudson came to Nebraska, bought the land and settled on it as his homestead.

The Constitution of Nebraska then declared that there should be no distinction made by law between resident aliens and citizens in reference to the possession, enjoyment or descent of property.

Sec. 25, Art. 1, Constitution of Nebraska, 1875.

When he settled on this land as his homestead, the Nebraska law declared that his deed without the signature and acknowledgment of his wife was void.

Of course, it is clear that written instruments to convey title to real estate must conform to the law of the state where the land is situated (See authorities cited p. 24, former brief).

The language of the treaty does not give a Norwegian alien in Nebraska the right to convey his homestead property in any other manner than that provided by Nebraska law. Consequently, a construction of the treaty

which permits such an alien to disregard Nebraska law in conveyance of homestead property will not be allowed.

Rocco v. *Thompson*, 157 Cal. 552, 37 L. R. A. (N. S.) 549. Affirmed 223 U. S. 317, 32 S. Ct. 207.

> "It appears clear to us from this language that, whatever right was given, it was intended to be a right which could conform to the laws of the country, and that, in view of the well-known complex form of our government, the phrase 'laws of the country' so far as the United States is concerned, means the local laws of administration and procedure of the respective states."
>
> *Rocco* v. *Thompson*, *supra*.

II.

The deeds of Christian Knudson to his homestead in Nebraska were void.

That the land in question was the homestead of Christian Knudson is unquestioned. It was such from the time he established his home upon it with his dependent father and mother in 1886 until his death.

That he had a living wife in Norway, the petitioner Todok, at the time he signed the deeds to the homestead is not disputed.

That the wife of Knudson did not execute or acknowledge those deeds is unquestioned.

Therefore, we say, those deeds were void.

Since 1879, the Nebraska Statute has been the following:

> "The homestead of a married person cannot be conveyed or incumbered unless the instrument by

which it is conveyed or incumbered is executed and acknowledged by both husband and wife."

Sec. 2819, Comp. St. Neb. 1922.

"If the homestead was selected from the separate property of either husband or wife it vests on the death of the person from whose property it was selected, in the survivor for life, and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will."

Sec. 2832, Comp. St. Neb. 1922.

Knudson never conveyed this homestead by will. He attempted to convey by deed in which his wife did not join.

Construing Section 2819, the Nebraska Supreme Court has uniformly held void deeds to the homestead not *executed and acknowledged by both husband and wife.*

"A contract in writing to convey a homestead which has been signed by both husband and wife, but which they have not acknowledged, is void and will not be in any way enforced."

Anderson v. *Cusack*, 115 Neb. 643.

Anderson v. *Schertz*, 94 Neb. 390.

"Estoppel cannot supply the statutory requirements of signature and acknowledgment to the incumbrance of a homestead where these are wanting."

Davis v. *Thomas*, 66 Neb. 26.

"It has been repeatedly held by this court that mortgages or conveyances of the homestead are void unless signed and acknowledged by both husband and wife."

Whitlock v. *Gosson*, 35 Neb. 829, 832.

"A homestead of a married person cannot be conveyed or incumbered unless the instrument by which

it is conveyed or incumbered is executed and acknowledged by both husband and wife."

Storz v. *Clark*, 117 Neb. 488.

"By an unbroken line of decision, this court has held that neither spouse has the right to dispose of the homestead except with the consent of the other and then only in the manner prescribed by the statute."

Storrs v. *Bollinger*, 111 Neb. 309.

The fact that one spouse is a non-resident of the state will not change this statutory rule.

"Here is a plain prohibition against the incumbrance of the homestead without the joint act of both husband and wife. It contains no exception with respect to an absent or insane husband or wife."

Whitlock v. *Gossson*, 35 Neb. 309.

Other states with similar statutes have ruled the same.

Rux v. *Adam*, 172 N. W. 913 (Minn.).

St. Dennis v. *Mullen*, 196 N. W. 258 (Minn.).

Murphy v. *Renner*, 109 N. W. 593 (Minn.).

Herron v. *Knapp*, 40 N. W. 149 (Wis.).

This rule is not changed by Section 1224, Comp. St. Neb. 1922, because the homestead and its conveyance or incumbrance are specifically controlled by Sections 2819 and 2832.

In *Cunningham* v. *Marshall*, 94 Neb. 302, to which reference is made by respondents, the court found, on the evidence, that neither the father nor his eldest son "ever acquired, occupied or claimed, when in possession, a homestead in the land."

It cannot rightfully be contended that this decision in the *Engen* case "fixes the meaning of state legislation."

The decision *incorrectly construes* a treaty, thereby holding a state statute inoperative.

III.

The treaty with Norway as construed by the Nebraska Supreme Court deprives petitioners of their property without due process of law and denies them the equal protection of the law.

We have little to add to the former brief (pp. 28, 29 30 and 31).

As already pointed out, the reasonable construction of the treaty brings about no conflict between it and the Nebraska statute.

However, the treaty as construed by the Nebraska Supreme Court does violate the Fifth Amendment. It deprives this widow and son of property rights by rendering inoperative a law of Nebraska.

Under the regular forms of law in Nebraska, this widow and son own this land. They have had it taken away by the Nebraska court, without a hearing.

The Union State Bank, Robert E. Brown, Anna S. Brown, H. G. Thomas, Administrator, and Theodore Griess in their answer to cross-petition of Todok alleged that she "is an alien subject of the Kingdom of Norway and is not entitled to take and hold real estate in the state of Nebraska for the reason that no treaty exists between the United States of America and the Kingdom of Norway whereby alien subjects of the Kingdom of Norway are permitted to acquire title by inheritance to real estate in the state of Nebraska" (Trans. p. 35).

The defendant First Trust Company in its answer made the same allegation (Trans. p. 37).

Todok in her reply set up the existence of the treaty (Trans. p. 39).

Between the petitioner Engen and the defendants, the treaty was not an issue. Its existence was not mentioned in the pleadings.

Admitting that pleading the treaty was not necessary and that the court could take judicial notice of this treaty as it might any statute, yet the decision of the Nebraska court, in taking a position on the treaty never pled nor argued in the trial court deprived petitioners of their day in court and took away their property rights without due process of law. The state court put in the hand of the United States government the treaty construction which thus deprived petitioners of their property.

For that reason, we say, the petitioners are deprived of their property without due process as guaranteed by the Fifth Amendment.

Also, it is perfectly clear, this construction of the treaty denies petitioners the equal protection of the law in Nebraska. It takes all Norwegian aliens owning land in Nebraska out of the general class and puts them in a class by themselves—a class not governed by the conveyancing laws of Nebraska. The decision strikes down the state moto, "Equality before the law" and raises class distinction.

If this inequality before the law were required by a reasonable construction of the treaty we would complain in vain, but the construction placed upon the treaty is unreasonable and unnatural.

Petitioners are entitled to the benefits of the statute, which provides that

> "all persons within the jurisdiction of the United States shall have the same right in every state and territory * * * to the full and equal benefit of all laws, etc."
>
> Sec. 1977, Revised Statutes.

> "The equal protection of the laws is a pledge of the protection of equal laws."
>
> *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 1070.

CONCLUSION.

We respectfully ask for a reversal of the decision of the Nebraska Supreme Court on the ground that the treaty, properly construed, does not conflict with the homestead act of Nebraska, but that both treaty and statute operate side by side. We ask the court to construe the treaty to mean that Americans and Norwegian aliens owning property in Nebraska are subject to the conveyancing law of Nebraska and that the treaty, if it applies to real estate at all, merely removes the discrimination of alienage.

Respectfully submitted,

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October Term, 1929.

Number 412.

MARI TOLLEFSEN TODOK AND KNUTE C. ENGEN, PETITIONERS,

V.

UNION STATE BANK OF HARVARD, NEBRASKA, A CORPORATION; LEROY A. MEGRUE AND BERTHA M. MEGRUE, ROBERT E. BROWN AND ANNA S. BROWN, H. G. THOMAS, ADMINISTRATOR OF THE ESTATE OF CHRISTIAN KNUDSON, DECEASED; THEODORE GRIESS, VAN E. PETERSON, AS RECEIVER OF THE UNION STATE BANK OF HARVARD, NEBRASKA; NEBRASKA STATE BANK OF HARVARD, NEBRASKA, AND THE FIRST TRUST COMPANY OF LINCOLN, NEBRASKA, RESPONDENTS.

BRIEF OF RESPONDENTS IN OPPOSITION TO WRIT OF CERTIORARI.

WALTER D. JAMES,
B. F. BUTLER,
J. H. GROSVENOR,
EARL CLINE,
FRANK D. WILLIAMS,
Counsel for Respondents.

(34,543)

The petition for a writ of certiorari seeks to review a judgment of the Supreme Court of Nebraska, holding

that under Section 6 of the Treaty of Amity and Commerce with the Kingdoms of Sweden and Norway of 1783, a subject of Norway, resident of Nebraska from 1878, in 1923 could not convey Nebraska land without the joinder of his wife from whom he had been separated since 1869, and who remained a subject and resident of Norway.

The precise holding of the Nebraska court was, that Section 2819, Comp. St. Neb., providing that "the homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife, if otherwise applicable, is inconsistent with Section 6 of the treaty."

It is submitted that under Rule 35 the writ of certiorari should not be granted as there is no special or important reason therefor.

I.

The construction given state statutes by the highest court of the state will, as a general rule, be followed by the Supreme Court in determining the jurisdiction to consider a case on the ground that a federal right is involved. *Bacous* v. *La.*, 232 U. S. 334, 58 L. Ed. 627. A decision of the highest court of a state fixes the meaning of state legislation, as though such meaning had been specifically expressed therein.

Knights of Pythias v. *Meyers*, 265 U. S. 31, 68 L. Ed. 891.

The contention of the petitioners, if sustained, would operate to deny rights granted by the treaty, even under the narrow construction contended for.

Assuming, for the present, that Section 6 of the treaty gives a subject of Norway no greater right in the dis-

position of his Nebraska real estate than a citizen of Nebraska, under former decisions of the Nebraska Supreme Court which have not been modified or overruled, a citizen of Nebraska, under the circumstances of the case at bar, could dispose of his real estate or so-called homestead without the joinder of his non-resident wife.

Section 1224, Comp. St. Neb. 1922, provides:

> "*The right of a married man or woman to inherit a part or all of the real estate of which his or her spouse was seized of an estate of inheritance at any time during the marriage,* may be barred by a conveyance executed by such husband and wife while residents of this state, and, *if either such husband or wife be not a resident of this state, by a deed of conveyance executed either by both of said parties or by the one seized at the time of such conveyance;* and such right to inherit may also be barred by the sale of such real estate under execution or other judicial sale, during the lifetime of the owner of the title."

The statute has been repeatedly upheld in Nebraska.

Atkins v. *Atkins*, 18 Neb. 474.
Minor v. *Morgan*, 83 Neb. 400.
Kiser v. *Sullivan*, 106 Neb. 454.

And see

Buffington v. *Grosvenor*, 46 Kan. 730, 27 Pac. 139.
Ferry v. *Spokane Ry. Co.*, 268 Fed. (9 C. C. A.) 117. Affirmed, 258 U. S. 314, 66 L. Ed. 635.

In *Cunningham* v. *Marshall*, 94 Neb. 302, the Nebraska Supreme Court held that a resident of Nebraska could convey the place on which he was residing without the joinder of his wife, who was and had been a resident of the state of New York.

The opinion is brief:

> "This is a suit in equity to establish homestead rights in 240 acres of land in Lancaster County. The trial court dismissed the case after a full hearing, and plaintiffs have appealed.
>
> "Felix Cunningham, a married man, held the legal title to the land, and, describing himself as a single man, deeded it to Frank McKelvie, May 5, 1897. For full value the latter deeded the land to Joseph H. Marshall, who willed it to defendant, his wife. He died June 15, 1907. Felix Cunningham is dead. Four of his five children are plaintiffs. His wife was divorced, and is not a party to this action. During the time covered by the asserted acquisition and occupancy of the homestead pleaded, the wife and all of the children, except the oldest son, lived in New York, and never saw the premises in controversy. A fair interpretation of all of the evidence leads inevitably to the conclusion that neither the father nor his oldest son ever acquired, occupied or claimed, when in possession, a homestead in the land, within the meaning of the homestead law. An analysis of the evidence upon which this conclusion rests would neither benefit the parties nor make an addition to the law, and will not be attempted. For failure to establish this material fact, the case of plaintiffs entirely fails. The decree conforms not only to the law, but to the demands of equity."

To require the joinder of petitioner, a resident subject of Norway, in a conveyance by a Norwegian subject, resident of Nebraska, would be to discriminate against the treaty rights, even if petitioner's construction of the treaty were granted—that the treaty merely prohibits discriminatory legislation.

It is to be noted that the fact that the grantor described himself as single was immaterial and created no estoppel.

France v. *Bell*, 52 Neb. 47.
Giles v. *Miller*, 36 Neb. 346.
Whitlock v. *Garson*, 35 Neb. 829.

II.

The Nebraska Supreme Court properly construed the treaty as giving a Norwegian subject the right to freely dispose of his goods and effects.

It is not the rule that a treaty must be construed so as to avoid conflict with a state statute.

Petitioner contends, "where a treaty might be construed in different ways, a liberal fair construction which will leave unchanged state statutes is to be preferred," and cites in support thereof, *Hauenstein* v. *Lyndham*, 100 U. S. 483, which, in fact, holds:

> "Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred. *Shanks* v. *Dupoint*, 3 Pet. 242. Such is the settled rule in this court."

Recent decisions adhere to this statement.

Jordan v. *Lashiro*, 73 L. Ed. 36.
Nielsen v. *Johnson*, 73 L. Ed. 221.

In the latter case, the rule is declared to be:

> "As the treaty making power is independent of and superior to the legislative power of the states, the meaning of the treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation, and when so ascertained must prevail over inconsistent state enactments.

> "When a treaty provision fairly admits of two constructions, one restricting, the other enlarging the right which may be claimed under it, the more liberal interpretation is to be preferred."

When the treaty of 1783 was adopted, homestead laws were unknown. They were unknown at common law. 29 C. J. 782. The first homestead law seems to have been enacted in 1839. 29 C. J. 782.

An alien, then, had no right to hold or dispose of real property.

> "Each state in the absence of any treaty provision to the contrary, has power to deny to aliens the right to own land within its borders."
>
> *Terrace* v. *Thompson*, 263 U. S. 197, 68 L. Ed. 255.

But such right was granted by the treaty with Norway and Sweden. Included, was the right to "freely dispose of their goods and effects either by testament, donation or otherwise in favor of such persons as they think proper." The treaty, and not the state law, furnishes the authority for the Norwegian subject to hold and dispose of Nebraska lands.

> "That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear. It is also clear that the protection which should be afforded to the citizen of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiations, and of regulation by mutual stipulations between the two countries."
>
> *DeGeofroy* v. *Riggs*, 133 U. S. 258, 33 L. Ed. 642.

The Nebraska statutes do, in general, discriminate against aliens (Comp. Statutes of Nebraska, Secs. 5686-5690),

but do not apply here because title was acquired prior to their enactment. Reference to such anti-alien land laws is here made to emphasize the point that the rights are determined by the treaty.

In this connection it is proper to call attention to the fact that in quoting the Nebraska Constitution of 1875 (brief, page 20) petitioner misquotes by omitting the word "resident" preceding the word "aliens." Section 25, Article 1 of the Constitution of 1875, provides:

> "No distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment or descent of property."

In 1920 this was amended to read:

> "There shall be no discrimination between citizens of the United States in respect to the acquisition, ownership, possession, enjoyment or descent of property. The right of aliens in respect to the acquisition, enjoyment and descent of property may be regulated by law."

The case of *People* v. *McClay*, 2 Neb. 9, holding that exemptions applied to aliens, did not involve land or any treaty rights.

Petitioner's argument that Section 6 of the treaty merely prohibits discriminating restrictions is based on the erroneous principle of construction that a treaty must be construed so as to avoid conflict with state law.

Some treaties expressly limit the rights of aliens to those possessed by citizens of the respective states. This was true, for example, of the treaty with Great Britain of 1794. *Hughes* v. *Edwards*, 4 Wheat. 489; the Treaty with France; *Bihaud* v. *Bize*, 105 Fed. 485; Treaty of 1911 with Japan in *Asakura* v. *Seattle*, 265 U. S. 332, 68

L. Ed. 1041; Treaty with Wurtemberg; *Frederickson* v. *Louisana*, 23 How. 445, 16 L. Ed. 577.

While there are statements in opinions to the effect that the treaty merely grants to subjects of Norway and Sweden equal rights with citizens, there is no actual decision to that effect. Statements in an opinion, are, of course, limited to the issues involved.

German Alliance Ins. Co. v. *Home Water Supply Co.*, 226 U. S. 219, 57 L. Ed. 195.

Thus, the quotation from *Peterson* v. *Iowa*, 245 U. S. 170 (brief, p. 22), must be read in the light of the point actually decided. The question decided in that case was whether the treaty with Sweden applied to benefit of Swedish heirs of a citizen of the United States. The decision was that the treaty dealt with the rights of subjects of Sweden owning land in the United States, and not with the rights of Swedish subjects to inherit land from a citizen of the United States.

The case of *Stizrud* v. *State*, 58 Wash. 339, likewise involved the right of a subject of Norway to inherit from a citizen of the United States. The decision determined the validity of an inheritance tax imposed at a higher rate upon non-resident alien heirs than was imposed upon citizens or resident aliens. On the erroneous theory that the treaty applied, the court held the tax to be invalid. It was not necessary to determine whether the treaty was confined to protecting against discriminating legislation. The court's theory that the treaty protected the rights of Norway subjects to inherit from a citizen of the United States was rejected by this Court in *Duus* v. *Brown*, 245 U. S. 174, 62 L. Ed. 228.

Nor is it necessary to consider the fears expressed by petitioner's brief (page 22), concerning the effect of the

interpretation of Section 6 of the treaty by the Nebraska Supreme Court.

The right to freely dispose of property may be made to comply with forms imposed by state law; but the right to freely dispose of property would be unduly restricted by a statute requiring a resident of a foreign country to join in the conveyance. It was for this purpose that Section 1224, Compiled Statutes of Nebraska (quoted, supra, p. 3) was enacted.

Construing a similar statute, the Supreme Court of Kansas said:

> "For reasons that were deemed sufficient, the legislature made the signature and conveyance of the non-resident wife unnecessary. The fact that the wife did not accompany her husband to Kansas, or had abandoned him and gone to another state, and may or may not have obtained a divorce elsewhere, thus leaving the status of the parties in doubt, and making it difficult to obtain a perfect transfer of land in many cases, may have been deemed sufficient reason for prescribing this rule of conveyance. The statute was enacted shortly after the admission of the state, and when it was rapidly increasing in population, through immigration from many of the eastern states and also foreign countries, many coming without their wives and families; and possibly the rule was adopted to avoid inconvenience and deception of the transfer of real property. * * * Although the estate of dower has been abolished in Kansas, the contingent interest of the wife in the real property of the husband is similar to dower in its inchoate stage; at least, it is substantially similar, as far as the validity of such a provision as we are considering is concerned."
>
> *Buffington* v. *Grosvenor*, 46 Kan. 730, 27 Pac. 139.

Section 6 of the treaty fairly admits of the construction placed thereon by the Nebraska Supreme Court.

At the time the treaty was adopted in 1783, it may have been considered essential to provide in the treaty not only that there should be no discrimination in respect to the disposition of property by aliens residing in the respective countries, but to grant aliens the right to dispose of property regardless of all local restrictions. There were then thirteen colonies or states, on the one hand; one kingdom, that of Norway and Sweden, on the other.

By treaty it was provided that citizens of the United States owning property in Sweden and Norway might "freely dispose of their goods and effects either by testament, donation or otherwise in favor of such persons as they think proper."

But, as contended by petitioner, subjects of Norway or Sweden owning land in the United States might "freely dispose of their goods and effects either by testament, donation or otherwise in favor of such persons as they think proper," provided the respective colonies granted to their citizens the right to dispose of property by will; and also subject only to any and all restrictions of every nature imposed by the respective colonies on their own citizens.

It has been declared that the right to dispose of property by will is wholly statutory and could be entirely denied by the state.

Dawson v. *Godfrey,* 4 Cranch. 321, 2 L. Ed. 634.
Magoun v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 42 L. Ed. 1037.
See note, 9 L. R. A. (N. S.) 121.

Under section 6 of the treaty, may the state of California deny to a subject of Norway or Sweden, owning property in that state, the right to dispose of the same by will? If petitioner's contention of the treaty is correct, that could be done if such right was denied to a citizen of California. While the Constitutions of California and of the United States may not confer upon citizens of California the fundamental right of disposing of their property by will, the treaty, which is the fundamental law, does confer upon subjects of Norway and Sweden the right to "freely dispose of their goods and effects either by testament, donation or otherwise in favor of such persons as they think proper."

III.

The assignment that "the decision of the Supreme Court of Nebraska so construes the treaty with Norway that petitioners are deprived of their property without due process of law" will not sustain the writ of certiorari.

The Fifth Amendment, cited by petitioners, does not apply to the states.

Barron v. *Mayor,* 7 Peters. 242, 8 L. Ed. 672.

Nor would a claim that the petitioners are deprived of their property without due process of law, contrary to the Fourteenth Amendment, be of merit.

Ferry v. *Spokane, P. & S. Ry. Co.,* 258 U. S. 315, 66 L. Ed. 635.

The argument of petitioners, on analysis, is a reiteration of their contention that the court erred in construing the treaty. An erroneous decision cannot be treated as a deprivation of property without due process of law.

Bonner v. *Gorman,* 213 U. S. 86, 53 L. Ed. 709.

Central Land Co. v. *Laidley,* 159 U. S. 112, 40 L. Ed. 94.

IV.

The decision does not deny petitioners the equal protection of the laws.

Petitioner, Mari Tollefsen Todak, is an alien, subject of Norway and non-resident of Nebraska and the United States.

Knute C. Engen was alien-born (Rec. 50; Rec. 75), and his alienage is presumed to continue.

2 C. J. 1045.

Hauenstein v. *Lyndham,* 100 U. S. 483.

He is not a resident of Nebraska (brief, p. 2).

The equal protection of the laws does not apply to persons not within the jurisdiction of the state. The Fourteenth Amendment reads:

> "Nor deny to any person within its jurisdiction the equal protection of the laws."
>
> 12 C. J. 1142.

The state could discriminate against the non-resident wife.

Ferry v. *Spokane, P. & S. Ry. Co.,* 258 U. S. 314, 66 L. E. 635.

Miner v. *Morgan,* 83 Neb. 400.

This assignment will not sustain the issuance of the writ of certiorari.

It is respectfully submitted that the writ of certiorari should not be granted.

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BRIEF ON BEHALF OF RESPONDENTS VAN E. PETERSON, RECEIVER, AND THE FIRST TRUST COMPANY OF LINCOLN, NEBRASKA.

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STATEMENT OF CASE.

Christian Knudson died in 1923, a resident of Hamilton County, Nebraska. He had never completed taking out

citizenship in this country and was an alien. His wife, the petitioner Marie Tollefsen Todok, from whom he had separated in Norway in 1868, was at all times and still is a non-resident alien, living in and a subject of the Kingdom of Norway. His son, the other petitioner, was born in Norway and came to Nebraska in 1893, and later permanently left the state of Nebraska. The foregoing facts appear in the statement of the case contained in the opinion of the Supreme Court of Nebraska (page 75, transcript of record).

There is no proof anywhere in the record and was none before the Supreme Court of Nebraska that the petitioner Knute C. Engen ever became a naturalized citizen of the United States. Being born an alien, and there being no proof in the record of his acquiring citizenship, the presumption applied by the Supreme Court of Nebraska as to his father remaining an alien would also apply to him, so that both of the petitioners in this suit are non-resident aliens of the state of Nebraska.

Prior to his death, Christian Knudson had in the year 1923 executed deeds to the property involved in this case to the respondents Browns and Megrues, the wives of Brown and Megrue being his nieces, and the consideration for the conveyance care and support rendered to him (pages 75-75, transcript of record). It was to set aside these deeds, and subsequent deeds and mortgages of the property in controversy, that petitioner herein Knute C. Engen instituted suit in the district court of Hamilton County, Nebraska, where the real estate in controversy was situated. Mari Tollefsen Todok, who was joined as a party defendant to the suit under the Nebraska practice, filed a cross-petition seeking the same relief.

The ground for attack upon the deeds in the district court in Nebraska was two-fold:

1. That the deeds were obtained from Christian Knudson by fraud and undue influence.

2. That the deeds covered property claimed to be the homestead of Christian Knudson and his wife, and were void because of the failure of the wife, living in Norway, to join in the execution of the deeds.

The district court in Nebraska found against the petitioners upon the first ground, but sustained their contention upon the second ground.

The Supreme Court of Nebraska, upon trial *de novo* upon appeal, as is required in suits in equity under the Nebraska practice, approved the finding of the trial court as to the first ground, stating in the opinion:

> "A careful consideration of the evidence contained in the record inclines us to the belief, consistent with the findings of the trial court who heard the evidence and observed the witnesses who testified in person before him, that there was no fraud, conspiracy or undue influence exercised by the defend ants, or their agents, on Christian Knudson concerning, or in connection with, the conveyances of the premises involved in this litigation to the defendants Browns and the defendants Megrues" (Transcript of Rec. p. 77).

The Supreme Court of Nebraska with respect to the second ground, the homestead question, reversed the judgment of the district court of Hamilton County and directed a dismissal of the suit. In doing so, the Supreme Court of Nebraska held that the treaty between Norway and the United States upon which it was necessary for petitioners to rely did not operate to clothe a non-resident

alien wife with any rights under the Nebraska homestead statute, so as to require her signature to a conveyance of real estate in Nebraska owned by her husband, a resident alien. The Supreme Court of Nebraska concerned itself solely with respect to a construction of the treaty and the rights of the parties thereunder, but it is necessary to take into consideration several Nebraska constitutional and statutory provisions that made it necessary for the petitioners to rely upon the treaty, in order to understand the part the treaty played in the decision of the case.

Nebraska Constitutional and Statutory Provisions Necessary To Understanding of Case.

Prior to the year 1920, the Constitution of Nebraska had provided:

> "No distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment or descent of property."
>
> Section 25, Article 1, Constitution of Nebraska of 1875.

In 1920, prior to the conveyances involved in this controversy and prior to the death of Christian Knudson, the Constitution of Nebraska was amended as follows:

> "There shall be no discrimination between citizens of the United States in respect to the acquisition, ownership, possession, enjoyment or descent of property.
>
> "The right of aliens in respect to the acquisition, enjoyment and descent of property may be regulated by law."
>
> Section 25, Article 1, Constitution of Nebraska of 1920.

Prior to the amendment of the Constitution in the respect noted, a Nebraska statute, enacted originally in 1889, provided:

> "Non-resident aliens and corporations not incorporated under the laws of the State of Nebraska are hereby prohibited from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase or otherwise, only as hereinafter provided, except that the widow and heirs of aliens who have prior to March 16, 1889, acquired lands in this state under the laws thereof, may hold such lands by devise or descent for a period of ten years and no longer, and if at the end of such time limited, such lands, so acquired, have not been sold to a *bona fide* purchaser for value, or such alien heirs have not become residents of this state, such lands shall revert and escheat to the State of Nebraska; and it shall be the duty of the county attorney in the counties where such lands are situated to enforce forfeiture of all such lands as provided by this article."
>
> Section 6273, Rev. Stat. Neb. 1913.

After the amendment of the Constitution in 1920, and prior to the conveyances involved in this controversy, the legislature of Nebraska in 1921 passed Chapter 142, Session Laws of Nebraska for 1921, which act was in full force and effect at the time of the conveyances in controversy and at the time of the death of Christian Knudson.

Section 1 of Chapter 142, Session Laws of Nebraska for 1921, now Sec. 5687, Comp. Stat. Neb. 1922, provides:

> "Aliens and corporations not incorporated under the laws of the State of Nebraska are hereby prohibited from acquiring title to or taking or holding any land, or real estate, or any leasehold interest extending for a period for more than five years or any other greater interest less than fee in any land,

or real estate in this state by descent, devise, purchase or otherwise, only as hereinafter provided, except that the widow and heirs of aliens who have prior to March 16, 1889, acquired lands in this state under the laws thereof, may hold such lands by devise or Browns and the defendants Megrues" (Transcript of descent for a period of ten years and no longer, and if at the end of such time herein limited, such lands, so acquired, have not been sold to a *bona fide* purchaser for value such lands or other interest therein shall revert and escheat to the State of Nebraska; and it shall be the duty of the county attorney in the counties where such lands are situated to enforce forfeitures of all such lands or other interests therein as provided by this article. Any resident alien may acquire title to lands in this state by devise or descent only, provided such alien shall be required to sell and convey said real property within five years from the date of acquiring the same and if he shall fail to dispose of the same to a *bona fide* purchaser for value within said time, said land and property shall revert and escheat to the State of Nebraska * * *."

Section 2 of Chapter 142, Session Laws of Nebraska for 1921, now Sec. 5689, Comp. Stat. Neb. 1922, provides:

> *"Any alien who owned land in this state on the date of the passage and taking effect of this act may dispose of the same during his life to bona fide purchasers for value,* and may take security for the purchase money with the same rights as to securities as a citizen of the United States except as hereinafter limited by this article."

Section 1220, Comp. Stat. 1922, originally enacted in 1907, and in full force and effect at the time of the conveyances involved herein and at the death of the deceased, provides:

> "When any person shall die, leaving a husband or wife surviving, all the real estate of which the deceased was seized of an estate of inheritance at any time during the marriage, or in which the deceased

was possessed of an interest either legal or equitable at the time of his or her death, which has not been lawfully conveyed by the husband and wife while residents of this state, *or by the deceased while the husband or wife was a non-resident of this state,* which has not been sold under execution or judicial sale, and which has not been lawfully devised, shall descend subject to his or her debts and the rights of homestead in the manner following:

"*First.* One-fourth part to the husband or wife, if the survivor is not the parent of all the children of the deceased and there be one or more children, or the issue of one or more deceased children surviving.

"*Second.* One-third part to the husband or wife if the survivor is the parent of all the children of the deceased and there be two or more children, or one child and the issue of one or more deceased children surviving.

"*Third.* One-half to the husband or wife, if the survivor is the parent of all the children of the deceased and there be only one child or the issue of a deceased child, surviving * * *."

Section 1224, Comp. Stat. 1922, originally enacted in 1907, provides:

"The right of a married man or woman to inherit a part or all of the real estate of which his or her spouse was seized of an estate of inheritance at any time during the marriage, may be barred by a conveyance executed by such husband and wife while residents of this state, *and, if either such husband or wife be not a resident of this state, by a deed of conveyance executed either by both of said parties or by the one seized at the time of such conveyance;* and such right to inherit may also be barred by the sale of such real estate under execution or other judicial sale, during the lifetime of the owner of the title."

Section 2816, Comp. Stat. 1922, originally enacted in 1879, provides:

> "A homestead not exceeding in value two thousand dollars, consisting of the dwelling house in which the claimant resides, and its appurtenances, and the land on which the same is situated, not exceeding one hundred and sixty acres of land, to be selected by the owner thereof, and not in any incorporated city or village, instead thereof, at the option of the claimant, a quantity of contiguous land not exceeding two lots within any incorporated city or village, shall be exempt from judgment liens, and from execution or forced sale, except as in this chapter provided."

Section 2819, Comp. Stat. 1922, originally enacted in 1879, provides:

> "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife."

Section 2832, Comp. Stat. 1922, originally enacted in 1879, provides:

> "If the homestead was selected from the separate property of either husband or wife, it vests on the death of the person from whose property it was selected, in the survivor, for life, and afterwards in decedent's heirs forever, subject to the power of the decedent to dispose of same, except the life estate of the survivor, by will."

The Treaty Provision Involved in This Case.

Article VI of the Treaty between the United States of America and the Kingdom of Sweden, which then included Norway, ratified in 1783, and revived by Article XVII of the Treaty of 1827, provides:

> "The subjects of the contracting parties in the respective states, may freely dispose of their goods

and effects either by testament, donation or otherwise, in favor of such persons as they think proper; and their heirs in whatever place they shall reside, shall receive the succession even *ab intestato,* either in person or by their attorney, without having occasion to take out letters of naturalization. These inheritances, as well as the capitals and effects, which the subjects of the two parties, in changing their dwelling, shall be desirous of removing from the place of their abode, shall be exempted from all duty called *'droit de detraction,'* on the part of the government of the two states respectively. But it is at the same time agreed, that nothing contained in this article shall in any manner derogate from the ordinances published in Sweden against emigrations, or which may hereafter be published, which shall remain in full force and vigor. The United States on their part, or any of them, shall be at liberty to make respecting this manner, such laws as they think proper."

Federal Questions Presented for Review.

The federal questions presented to this court for review may be summarized as follows:

I.

Does Article VI of the Treaty with Sweden of 1783, revived by the Treaty of 1827, include within its scope protection to a claim of homestead growing out of the marital relationship in favor of an alien wife residing in Norway so as to prevent a valid conveyance without her signature of Nebraska real estate by her husband, an alien resident of Nebraska?

II.

Does Article VI of the Treaty with Sweden of 1783, revived by the Treaty of 1827, prevent a valid conveyance of Nebraska real estate by a resident alien without the

signature of a non-resident alien wife, a right accorded to a citizen of Nebraska by interpretation of the homestead statute by the highest court of that state?

III.

Do the Due Process of Law and Equal Protection of the Law clauses of the Constitution of the United States protect a claim of homestead growing out of the marital relationship in favor of an alien wife residing in Norway so as to prevent a valid conveyance without her signature of Nebraska real estate by her husband, an alien resident of Nebraska?

Disposition of Federal Questions By Supreme Court of Nebraska.

The Supreme Court of Nebraska answered the treaty questions that are presented to this court in the negative, predicating its holding in an opinion written by Justice Eberly (Trans. of Rec. pp. 74-80) upon two separate and distinct grounds:

1. That the treaty did not protect the non-resident widow with reference to any claimed rights arising under the Nebraska homestead statute for the reason that the language of the treaty disclosed no intention on the part of the framers of the treaty to create or provide for a non-resident alien wife any special rights or privileges whatever because of, or based upon, a marital relation sustained to an alien owner of property, and also for the reason that homestead statutes were unknown at the time the treaty was entered into, and therefore necessarily not within the contemplation of the contracting nations.

2. That the requirement of the Nebraska homestead law that a wife join in a conveyance thereof by her husband,

if otherwise applicable, was in violation of the terms of the treaty, which gave to the subjects of the contracting parties the right to freely dispose of their goods and effects by testament, donation or otherwise.

The constitutional question presented to this court for review was not mentioned or discussed in the opinion of the Nebraska Supreme Court, if it was ever presented for consideration.

PROPOSITIONS OF LAW RELIED UPON BY RESPONDENT.

I.

In the absence of treaty to the contrary, a state has power to deny to aliens the right to own land within its borders, or to hold any lesser interest or right therein.

Webb v. *O'Brien*, 263 U. S. 112, 44 Sup. Ct. Rep. 112.

Terrace v. *Thompson*, 263 U. S. 196, 44 Sup. Ct. Rep. 15.

Hauenstein v. *Lynham*, 100 U. S. 483.

Chirac v. *Chirac*, 2 Wheat. 259, 4 U. S. (L. Ed.) 234.

Beard v. *Rowan*, 9 Pet. 301, 9 U. S. (L. Ed.) 135.

Wunderle v. *Wunderle*, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84.

Dougherty v. *Kubat*, 67 Neb. 269, 93 N. W. 317.

II.

Since the treaty-making power is independent of and superior to the legislative power of the states, meaning of treaty provisions is not restricted by any necessity of avoiding possible conflict with state legislation, and, when

so ascertained, must prevail over inconsistent state enactments.

Nielsen v. *Johnson,* 279 U. S. 47, 49 Sup. Ct. Rep. 223.

Ware v. *Hylton,* 3 Dall. 199, 1 L. Ed. 568.

III.

When a treaty provision fairly admits of two constructions, one restricting and one enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred.

Nielsen v. *Johnson,* 279 U. S. 47, 49 Sup. Ct. Rep. 223.

Jordan v. *Tashiro,* 278 U. S. 123, 49 Sup. Ct. Rep. 47.

Geofroy v. *Riggs,* 133 U. S. 285, 10 Sup. Ct. Rep. 295.

Goos v. *Brooks,* 117 Neb. —, 223 N. W. 13.

IV.

In construing treaties, it is proper to consider the circumstances existing at the time the treaty was ratified to determine what was within the contemplation of the contracting parties.

Ross v. *McIntyre,* 140 U. S. 453, 11 Sup. Ct. Rep. 879.

Liberato v. *Royer,* 270 U. S. 535, 46 Sup. Ct. Rep. 373.

Strother v. *Lucas,* 12 Peters 410, 9 L. Ed. 1137.

Mott v. *Cline,* (Cal) 253 Pac. 718.

V.

Treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals.

Sullivan v. *Kidd*, 244 U. S. 433, 41 Sup. Ct. Rep. 158.

26 R. C. L., page 926.

VI.

In interpretation of contracts, it is an elementary principle that the court will place itself in the position of the parties under the circumstances existing at the time the contract was made to ascertain what was within the contemplation of the contracting parties. The surrounding circumstances must be considered as of the time the contract is made and not in the light of subsequent events.

Mobile etc. Ry. Co. v. *Jurey*, 111 U. S. 584, 4 Sup. Ct. Rep. 566.

Reed v. *Merchants' Mut. Ins. Co.*, 95 U. S. 23, 24 L. Ed. 348.

Fiscus v. *Wilson*, 74 Neb. 444, 104 N. W. 856.

Nebraska Hardware Co. v. *Humphrey Hardware Co.*, 81 Neb. 693, 116 N. W. 659.

13 Corpus Juris, page 542.

6 Ruling Case Law, page 849.

VII.

Treaty provisions are sufficiently complied with by according to the alien in this country all of the rights of a citizen, without going further and extending rights to a non-resident alien wife similar to the rights of a resident wife.

Mariorano v. *Baltimore R. R. Co.*, 213 U. S. 268, 29 Sup. Ct. 424.

VIII.

Homestead laws are of American origin, and were developed in this country long after the treaty with Sweden of 1783 was ratified.

29 Corpus Juris, Homestead, page 782.

13 Ruling Case Law, Homestead, par. 2, pages 540-541.

Barney v. *Leeds,* 51 N. H. 253.

IX.

The purpose and intent of homestead laws was to protect actual homes, and not to give any benefits to a non-resident alien wife in real estate.

Tromsdahl v. *Nass,* 27 N. D. 441, 146 N. W. 719.

Stanton v. *Hitchcock,* 64 Mich. 316, 31 N. W. 395.

Dickman v. *Birkhauser,* 16 Neb. 686, 21 N. W. 396.

Cunningham v. *Marshall,* 94 Neb. 302, 143 N. W. 197.

X.

Rights growing out of the marital relationship, such as dower and homestead, are not privileges or immunities of citizenship, either state or federal within the meaning of Article 4, Section 2, of the Constitution of the United States, nor is the power of the states to regulate same denied by the Fourteenth Amendment to the Constitution.

Ferry v. *Spokane, P. & N. Ry. Co.,* 258 U. S. 314, 42 Sup. Ct. Rep. 358.

Randall v. *Krieger,* 23 Wallace 137, 23 L. Ed. 124.

Miner v. *Morgan,* 83 Neb. 400, 119 N. W. 781.

Buffington v. *Grosvenor,* 26 Kan. 730, 27 Pac. 137, 13 L. R. A. 282.

Rieger v. *Harrington,* 102 Ore. 603, 203 Pac. 576.

Thornburn v. *Doscher,* 32 Fed. 812.

XII.

Michigan, Kansas, Wisconsin and Nebraska all have statutes permitting one spouse to convey real estate alone where the other spouse is a non-resident of the state. All of these states also have homestead statutes. Construing the statutes together, these states have uniformly held that where the wife is a non-resident, a conveyance by the husband alone of property falling within the statutory definition of the husband's homestead is valid. The purpose of permitting one spouse to convey without the signature of a non-resident wife is to insure land titles against the claims of absent and probably unknown wives. The Supreme Court of the United States has pointed out the uniformity of statutory construction maintained by the states of Michigan, Kansas, Wisconsin and Nebraska, with reference to conveyance by husband alone where the wife is a non-resident, and has upheld the constitutionality of such statutes.

Ferry v. *Spokane, P. & S. Ry. Co.,* 258 U. S. 314, 42 Sup. R. 358.

Miner v. *Morgan,* 83 Neb. 400, 119 N. W. 781.

Cunningham v. *Marshall,* 94 Neb. 302, 143 N. W. 197.

Ligare v. *Semple,* 32 Mich. 438.

Stanton v. *Hitchcock,* 64 Mich. 316, 31 N. W. 395.

Buffington v. *Grosvenor,* 46 Kan. 730, 27 Pac. 137.

Jenkins v. *Henry,* 52 Kan. 608, 35 Pac. 216.

Bennett v. *Harms,* 51 Wis. 251, 8 N. W. 222.

Ekegren v. *Marcotte,* 159 Wis. 530, 150 N. W. 969.

XI.

A decision of the highest court of a state fixes the meaning of state legislation, as though such meaning had been specifically expressed therein.

Knights of Pythias v. *Meyers*, 185 U. S. 31, 68 L. Ed. 891.

ARGUMENT.

I.

The treaty between Norway and the United States did not protect any claim or privilege of homestead growing out of the marital relationship to the non-resident wife so as to prevent her husband, an alien resident of Nebraska, from validly conveying real estate owned by him without his wife's signature to the conveyance.

It has been the fixed legislative policy of Nebraska to deny to non-resident wives any inchoate interest or expectancy in the real estate of her husband. The underlying basis for this legislative policy is stated by this court in *Ferry* v. *Spokane, P. & S. Ry. Co.*, 258 U. S. 314, 42 Sup. Ct. Rep. 358, where, after pointing out the similar legislative policy of the states of Oregon, Michigan, Wisconsin, Kansas and Nebraska, and the construction placed thereon by the courts of those states, it is said:

> "The cases recognize that the limitation of the dower right is to remove an impediment to the transfer of real estate and to assure titles against absent and probably unknown wives."

While the court in the above case was dealing with the principle of dower, the same rule is applicable to homestead exemption. Both are created by statute and the inchoate interest of the wife during the lifetime of the

husband as to each arises by virtue of the marital relationship.

Under the Nebraska statutes hereinbefore quoted, a conveyance by the husband alone where the wife is a non-resident operates to bar the wife's right of inheritance, which under the Nebraska law was substituted in 1907 in lieu of dower. Prior to 1907, when dower existed, it was cut off by transfer of the husband alone, when the wife was a non-resident.

Comp. Stat. 1903, C. 23, Sec. 20.

Miner v. *Morgan*, 83 Neb. 400, 119 N. W. 781.

It is also a fixed legislative policy of Nebraska to deny to non-resident aliens the right to acquire or hold any interest in Nebraska real estate.

Under the Constitution of 1875, prior to its amendment in 1920, the legislature of Nebraska was prohibited from making any distinction between resident aliens and citizens with reference to the possession, enjoyment or descent of real estate. Article 1, Section 25, Nebraska Constitution of 1875, hereinbefore set out in full. This constitutional provision, however, did not prevent legislation with reference to non-resident aliens. In 1889, Nebraska passed a statute prohibiting non-resident aliens from acquiring title to or taking or holding any lands or real estate by descent, devise, purchase or otherwise, except that the widows and heirs of aliens who had prior to March 16, 1889, acquired lands in the state under the laws thereof might hold same for a period of ten years and no longer. This statute was held constitutional in *Dougherty* v. *Kubat*, 67 Neb. 269, 93 N. W. 317.

Under the Nebraska Constitution, as amended in 1929, the legislature was given power to regulate by law the acquisition, enjoyment and descent of property of aliens. Sec. 25, Article 1, of the Nebraska Constitution of 1920, hereinbefore set out.

Under a statute passed in 1921, pursuant to the constitutional amendment of 1920, all aliens, whether resident or non-resident, were prohibited from acquiring or holding any land, or real estate, or any leasehold interest therein extending for a period for more than five years or any other greater interest less than fee in any land, only as provided in the act. There is no provision in the act permitting an alien to hold a homestead interest in land. Aliens who owned land in the state on the date of the passage of the act are permitted to dispose of the same during their lifetime. Widows and heirs of aliens who had prior to March 16, 1889, acquired lands in the state are permitted to hold such lands for a period of ten years and no longer. See provisions of Chapter 142, Session Laws of Nebraska for 1921, hereinbefore set out.

With the foregoing constitutional and statutory provisions in mind, let us examine the Nebraska homestead act. It was enacted in 1879. Its purpose was to protect an actual home to the claimant of homestead residing thereon. To effectuate this purpose, and to protect the wife in the enjoyment of the home, a life estate in the homestead proprty vested in the wife upon the dath of the husband, of which he could not deprive her by will. Her signature was required to a deed of the homestead property. In other words, it was an inchoate interest or expectancy in his real estate which ripened on his death into a life estate.

The alien law, enacted ten years later in 1889, is absolutely inconsistent with and repugnant to the homestead act, if the homestead act be construed to give such inchoate life estate to a non-resident alien wife. Under the alien law, if the property was acquired by her husband prior to March 16, 1889, she could hold same for a period of ten years and no longer. If the property was acquired by her husband subsequent to March 16, 1889, the non-resident alien wife under the alien law could not acquire or hold the real estate at all. A prohibition to hold land at all, or even for ten years, is inconsistent with a life estate under the homestead act. If the homestead act did operate to give a non-resident alien wife an inchoate life estate in the property of her husband, a construction contrary to the spirit and intent of the act, the later alien statute operated as a repeal to the extent of the repugnancy, so as to preclude any homestead interest or expectancy in a non-resident alien wife, unless such right of homestead was saved to her by virtue of some applicable treaty.

Moreover, under the 1921 alien law passed pursuant to the constitutional amendment of 1920, it would seem that the benefit of homestead exemption in the land was taken away from all aliens, whether resident or non-resident. Counsel in their brief in this court (pp. 25-25) say that the Nebraska Supreme Court has held that the homestead exemption obtains in Nebraska, whether the occupant of the homestead was an alien or a citizen. In support of this statement, *People* v. *McClay*, 2 Neb. 9, is cited. An examination of that case discloses that it did not involve the homestead exemption at all, but an exemption of $500.00 in money to heads of family out of proceeds of sale of personal property on execution. Moreover, the case arose under the Constitution of 1875.

The Nebraska Constitution of 1875 was specifically amended in 1920 to give the legislature the power to regulate the acquisition, enjoyment and descent of property of all aliens, whether resident or non-resident. The benefit of homestead exemption is a statutory benefit which the state can give or withhold as it pleases. Pursuant to this constitutional amendment, the Nebraska legislature of 1921 passed an act with reference to aliens which is wholly inconsistent and repugnant to the existence of homestead exemption in an alien, and operated to take away from aliens any benefits under the homestead statute, unless such benefits were saved to aliens by virtue of some applicable treaty.

To obviate the purport and effect of the alien statute, the petitioners advance and rely upon the treaty between Norway and the United States as removing the disabilities of alienage and placing Knudson and his wife, Marie Tollefsen Todok, upon the same plane and standing as citizens of the United States. Their position is succinctly stated on page 25 of their brief in the following language:

> "The treaty removed the disabilities of alienage and placed Knudson on an equal footing with other homestead owners in Nebraska."

While counsel for petitioners constantly stress and refer to the homestead right of Knudson, it is not any right of his that they are seeking to enforce. Knudson exercised his right under the 1921 alien law to dispose of his land in his lifetime. He deeded the lands to those people who in his old age had rendered him care, comfort and support. Petitioners cannot point to anything that Knudson was prevented from doing by the construction placed upon the treaty by the Nebraska Supreme Court.

Their claim is based upon something that the Supreme Court of Nebraska permitted him to do under the treaty, which they say he should not have been permitted to do because his wife did not join.

It is the rights, if any, of the wife to the protection of the treaty that must be decided by this court. It was from this standpoint that the Supreme Court of Nebraska approached the decision of the case.

In stating the question presented for determination by it, the Nebraska Supreme Court (page 77, transcript of record) said:

> "We have before us for determination, therefore, the question of rights wholly derived from a subject of Norway, and who was an alien both at the time of the execution of the conveyances questioned and at the time of his death."

After quoting the language of the treaty, the Nebraska Supreme Court in its opinion (page 78, transcript of record) says:

> "To what extent, if any, is the claim of homestead in the property in controversy made on behalf of Mari Tollefsen Todok sustained and supported by the words quoted. These treaty provisions, referred to, date from 1783."

This was the crucial point in the case, and the point upon which the decision of the Nebraska Supreme Court rests. If Mari Tollefsen Todok does not have any claim of homestead in the property sustained and supported by the treaty, then no federal jurisdiction exists in this court upon which to reverse the judgment of the highest court in Nebraska.

A.

First Ground For Decision.

The first reason of the two assigned by the Nebraska Supreme Court in its opinion for denying that the treaty protected any homestead claim of the widow in Norway is contained in the following language in the opinion:

> "Homestead laws are strictly of American origin. The earliest statute of this kind was that enacted by the Republic of Texas, January 26, 1839. The first constitutional guaranty of homestead exemption was that of the Constitution of Texas in 1845. This was followed in turn by Vermont in 1849. All other states of the American Union adopted this policy at a date subsequent to 1849. In view of the history of the development and adoption of this public policy, it can hardly be inferred that the question of homestead rights were in contemplation of the makers of the treaty of 1783. True, the thirteen American states which then formed the Confederacy had each substantially adopted, for the benefit of the wife, the English doctrine of dower as defined at common law. Even so, it is, and was, an established doctrine of common law that 'dower rights are cast upon the widow by operation of law, and it is a well-settled common-law rule that an alien cannot cast any dower rights upon his wife, nor can an alien widow of a citizen take by dower any interest in her husband's lands.' 2 C. J. 1066, Sec. 32.
>
> "An examination of the terms of the treaty before us discloses no intention to extend the benefits of common-law dower to the wife of the alien; in fact, no provision therein contained discloses any purpose to create or provide for her benefit any special rights or privileges whatever because of, or based upon, a marital relation sustained to an alien owner of property" (Transcript of Rec. p. 78).

We submit that the first reason assigned by the Supreme Court of Nebraska in the foregoing language is ample and sufficient to sustain its judgment without regard to the second reason assigned of conflict between the terms of the treaty and the Nebraska homestead statute. Granting as true for the sake of argument that there is no conflict as petitioners contend, if the terms of the treaty disclose no intention to create or provide for the benefit of a non-resident alien wife special privileges or rights growing out of the marital relationship, then petitioners have not been deprived of any right under the treaty.

We submit that the first reason advanced by the Nebraska Supreme Court to sustain its conclusion is clearly right. How could the framers of the treaty intend to protect a privilege that was wholly unknown and unheard of at the time the treaty was framed? The terms of the treaty itself: "The subjects of the contracting parties in the respective states may freely dispose of their goods and effects, either by testament, donation or otherwise in favor of such persons as they think proper; and their heirs in whatever place they shall reside shall receive the succession even *ab intestato* either in person or by their attorney without having to take out letters of administration," certainly do not make any reference to or provision for any special privileges to a wife growing out of the marital relationship.

Counsel for petitioners in their brief have not attempted to meet the clear and logical reasoning of Judge Eberly that the benefit of homestead exemption, a thing unknown and unheard of at the time the treaty was contracted, could not have been intended by the contracting parties to be included within the scope of the treaty. Counsel confine their brief solely to the matter of conflict between the treaty and the statute.

The proposition is so simple and elemental that a treaty is to be construed in the light of the circumstances existing at the time it is entered into that apparently there is not a great abundance of authority upon the proposition.

In *Mott* v. *Cline,* (Cal.) 253 Pac. 718, the Supreme Court of California applied the same principle that the Nebraska Supreme Court did in this case. It was there held:

> "Treaties must be construed with respect to situation existing at time of ratification, difficulties sought to be corrected as shown by treaty, and modifications agreed on in supplemental treaties."

The Supreme Court of California in the Mott case, supra, had under consideration the California alien land laws. The applicability of those laws to subjects of China were challenged as being in contravention of the treaty with China. The treaty in general accorded to Chinese subjects, as classified in the act, the rights, privileges, immunities and exemptions which were accorded to "the citizens and subjects of the most favored nation." It is said in the opinion:

> "At the time the treaty of 1881 was adopted, they were not generally engaged in agricultural pursuits, and were no landholders, but mainly contract laborers, who had been brought into this country originally by the builders of the great transcontinental railroads to be used as laborers in the construction of said railroads. They settled in districts which became greatly overpopulated, and later engaged in the laundry business or mercantile pursuits. It was not until later that they became engaged in the vegetable and garden truck business, or

had any contact with the soil as producers of their ownership of or dominion over the agricultural lands of the state until a much later period. The proclamation and preamble of the treaty very clearly shows that it was meant purely as a purely immigration and labor treaty, *and it must be construed with respect to the situation that existed at the time it was ratified* and the difficulties sought to be corrected as shown by the treaty itself and by modifications that were agreed upon in supplemental treaties."

If it is permissible in construing treaties to take into consideration that at the time the treaty was entered into, Chinese were not generally engaged in this country in agricultural pursuits, and therefore ownership of agricultural lands was not within the purview of the treaty, it surely ought to be permissible for the Nebraska Supreme Court to take into consideration that the benefit of homestead exemption, a thing then wholly unknown and wholly unheard of, was not within the contemplation of the makers of the treaty.

This court, we believe, applied the same principle of construing a treaty in the light of circumstances existing at the time of ratification in *Liberato* v. *Royer,* 270 U. S. 535, 46 Sup. Ct. Rep. 373. In that case, this court held that a provision of the Pennsylvania Workman's Compensation act, providing that non-resident alien parents should not be entitled to any compensation, was not in conflict with the treaty with Italy of 1871, as amended in 1913, which amendment guaranteed to citizens of each country right of recovery for injuries or death caused by negligence or fault allowed by that country to its own nationals. It is pointed out in the opinion that the concept of liability without fault underlying workman's compensation laws was at the time the amendment to the treaty

was ratified exceptional and not usually imposed except as the result of voluntary arrangement. It is said in the opinion:

> "This amendment was suggested by the decision in *Maiorano* v. *Baltimore & Ohio R. R. Co.*, 29 Sup. Ct. 424, 213 U. S. 268, 53 L. Ed. 792, that under the laws of Pennsylvania a non-resident alien widow could not recover for the death of her husband caused by the defendant's negligence, although citizens of the state were given a remedy. Following this suggestion, the words of the amendment, if taken literally, deal only with death caused by negligence or fault. It is natural that they should be limited in that way. Apart from those states, of which Pennsylvania is not one, that very recently have substituted for the common law a general system of quasi insurance, liability without fault is exceptional and usually has not been imposed for death except as the result of voluntary arrangement."

Applying the language of the foregoing opinion to the case at bar, the words of the treaty with Sweden, involved in this case, if taken literally, apply only to the right of the alien to receive property by inheritance, and is limited to that, and does not include a super-added benefit of homestead. The benefit of homestead exemption is not within the purview of the treaty because homestead laws were not known at the time the treaty was ratified. Like workman's compensation laws under the Italian treaty involved in the Liberato case, homestead laws were not within the contemplation of the treaty involved in this case.

In *Ross* v. *McIntyre*, 140 U. S. 453, 11 Sup. Ct. Rep. 897, 35 L. Ed. 581, it is said in an opinion by Judge Field:

"It is a canon of interpretation to so construe a law or a treaty as to give effect to the object designed, and for that purpose all of its provisions must be examined in the light of attendant and surrounding circumstances."

The same rule was applied in *Strother* v. *Lucas,* 12 Peters 410, 9 L. Ed. 1137.

The language of the treaty, as is pointed out in the opinion of the Nebraska Supreme Court, fails to disclose any purpose to create or provide any special rights or privileges whatever because of or based upon a marital relation sustained to an alien owner of property. As we read the treaty, the only rights given to others than the owners of the property do not arise until the time of his death. The treaty so far as the heirs of an alien are concerned deal only with property owned by him at the time of his death. The treaty does not purport to protect any inchoate interest in his property during his lifetime to his wife, so as to require her signature to a conveyance thereof.

There is another cogent reason why the framers of the treaty could not have intended to protect a claim of homestead to a non-resident alien wife and that reason arises out of the purpose and spirit of homestead laws. The intent of a homestead act is to keep the family together, not living separate and apart. The benefit a homestead act was intended to afford was protection of the family home, not creation of property rights in a non-resident wife.

The language of the Supreme Court of North Dakota in *Tromsdahl* v. *Nass,* (N. D.) 146 N. W. 719, where a non-resident wife residing in Sweden contended that a mortgage executed by her husband in North Dakota was

void because it covered his homestead and was not signed by her, is applicable:

> "It is doubtful if there is any valid reason why a married man in plaintiff's situation, who may never bring his family to this country (not having done so for six years since his arrival, and he being here, as the proof discloses, because he can secure more wages than in Sweden, and who elects to remain an alien, not giving this country even citizenship in return for its gold), should enjoy a homestead privilege as the resident head of a resident North Dakota family, an exemption privilege, or right denied to even the native and resident single men and women under ordinary circumstances. * * * Homestead provisions should be construed with reasonable liberality to effect their purposes, but it is a joke to contend that the framers of the homestead statutes ever contemplated that they should be invoked under such circumstances as these. * * * The homestead exemption in this state is primarily for the protection of the family residing in this state and upon the homestead tract; the presumption being that, if the family is residing elsewhere, the state of its actual residence will look after its own, and the same should be equally true as to aliens in a foreign country."

The language of the Michigan Supreme Court in *Stanton* v. *Hitchcock,* 64 Mich. 316, 31 N. W. 395, 8 Am. St. Rep. 821, in denying homestead to a non-resident wife, is also applicable:

> "Under our laws the sale by a husband whose wife is a non-resident carries the property free from any right of dower. Actual non-residence in such case, in spite of the marital relation cuts off any control over the sale of a complete title. There is as much reason for the confinement of the homestead law. * * * The law would be grossly tyrannical if it tied the husband's hands in the one case at least, and

it cannot be possible that such consequences could have been designed by the constitution. It was designed to protect those who had subjected themselves to its laws, and acted in reliance on them, but not to treat as homes what are not homes, or give powers to non-residents which could not, under any circumstances, be of any use to them personally."

And finally, the language of the Nebraska Supreme Court, construing the Nebraska homestead act in *Dickman v. Birkhauser*, 16 Neb. 686, 21 N. W. 396, is extremely applicable:

"A homestead, in law, means a home place, or place of the home, and is designed as a shelter of the homestead roof, and not as a mere investment in real estate, or the rents and profits derived therefrom. L. Washb. Real Prop. (4th Ed.) 345. In other words, it is the actual home or domicile of the party. There is no claim that the defendant's home was at the residence of her husband at the time of his death."

We submit, that in view of the purpose, spirit and intent of homestead laws, the framers of the treaty could not have contemplated protection of an inchoate interest arising by virtue of such statutes in a non-resident alien wife living separate and apart from her husband.

Counsel for petitioners have quoted in their supplemental brief (p. 5) from *Mariorano* v. *Baltimore R. R. Co.*, 213 U. S. 268, 39 Sup. Ct. Rep. 424, and we think the question made alone would cause an affirmance of the judgment of the Nebraska Supreme Court. In the Mariorano case, this court held that the Italian treaty of 1871 did not protect to a non-resident alien wife a right of action for wrongful death of her husband, an Italian subject, living in Pennsylvania. The treaty by its terms

gave to citizens of each, in the territory of the other, equality with the natives of rights and privileges in respect of protection and security of property. The quotation made by counsel for petitioners in their supplemental brief, and which we think is very pertinent in this case is as follows:

> "If an Italian subject, sojourning in this country, is himself given all the direct protection and security afforded by the laws to our own people, including all rights of action for himself or his personal representatives to safeguard the protection and security, the treaty is fully complied with, without going further and giving to his non-resident alien relatives a right of action for damages for his death, although such action is afforded to native resident relatives, and although the existence of such an action may indirectly promote his safety."

The treaty with Italy was complied with by giving to the husband the same right accorded to citizens of this country, without extending rights to a non-resident alien wife. So, in this case, the treaty with Sweden is complied with by giving to the husband the right to freely dispose of his property, without extending to a non-resident alien wife an interest in the property so as to prevent a conveyance by him without her signature.

There is no broad and sweeping language in the treaty here under consideration giving to the subjects of the contracting parties all the privileges and immunities of citizens of the most favored nation. The treaty merely accords the right to an alien to dispose of his goods and effects freely by testament, donation or otherwise, and to his heirs to receive the property by succession exempted from all duty called "*droit de detraction.*" The Supreme Court of Nebraska denied none of these rights to

Christian Knudson or the petitioners. It permitted the deeds of Christian Knudson to stand. The treaty did not protect any special privilege or benefit to a non-resident wife because of the marital relationship. We submit that this language of the Supreme Court of Nebraska is ample to sustain its judgment and is decisive of the case:

> "An examination of the terms of the treaty before us discloses no intention to extend the benefits of common-law dower to the wife of the alien; in fact, no provision therein contained discloses any purpose to create or provide for her benefit any special rights or privileges whatever because of, or based upon, a marital relation sustained to an alien owner of property" (Transcript of Rec. p. 79).

B.

Second Ground For Decision.

With reference to the second ground for the decision of the Nebraska Supreme Court, namely, the conflict between the terms of the homestead statute and the treaty, it is not necessary to extend the discussion in this brief by dwelling at any considerable length thereon, as the first ground for the decision is ample to sustain the judgment. However, we submit that the opinion of the Nebraska Supreme Court is in accord with the literal language of the treaty, and is in accord with the general principle of treaty construction that a treaty should be liberally construed in favor of the rights to be exercised under the treaty. According to the language of the treaty, subjects of the contracting parties were given the right to freely dispose of their goods and effects to such persons as they see fit. When confronted with a statutory provision which in practical effect would impose a serious restrain on the exercise by an alien of his right to dispose of real estate, the Nebraska Supreme

Court decided against the statute and in favor of the treaty. It would be a real restraint upon alienation of the property to require a non-resident wife living in a foreign country to join in conveyance of real estate of an alien living in Nebraska. The case at bar is a very good example. How could Christian Knudson be said to have the right to "freely" dispose of his goods and effects, if it was necessary for him to secure the consent and signature to the conveyance of his wife living in Norway from whom he had been separated for over fifty years? When a man and wife are living together, it is not usually difficult to have both join in the conveyance, and it is not usually difficult for purchasers to determine who should sign the conveyance. But to require the signature of a non-resident and probably unknown wife would not only hamper the execution of the conveyance but would deprive the alien of purchasers for his land, who would not care to buy lands of aliens where there was always a possibility of an absent and unknown wife. If the state could hamper his right to dispose of his property by requiring the consent of a non-resident wife, it could hamper his right to dispose of his property by other restrictions.

Counsel for petitioners complain bitterly because they say that the decision of the Nebraska Supreme Court gives the alien greater rights than Nebraska citizens. As a matter of fact, it operates to place them upon exactly the same basis. An alien in Nebraska with a resident wife could not validly execute a deed that would deprive his wife of her marital interest in the property without her joining in the conveyance. Sec. 1224, Comp. Stat. 1922. On the other hand, a citizen of Nebraska who has a non-resident wife has the right to convey the homestead by his deed alone.

Cunningham v. *Marshall*, 94 Neb. 302.
Dickman v. *Birkhauser*, 16 Neb. 686.

Petitioner contends for a decision that Knudson, a Norwegian subject, could not make a valid deed without the joinder of his wife, who at all times was a resident of Norway and from whom he had been separated for 50 years. Such a decision would deny to Knudson right given him by the treaty to freely dispose of his property, even if it be considered that the treaty gave him no greater rights than a citizen.

The Supreme Court of Nebraska had definitely held that a citizen of Nebraska could convey land on which he resided with a minor son without the consent of his wife, who at all times had been a resident of New York. *Cunningham* v. *Marshall*, 94 Neb. 302:

> "This is a suit in equity to establish homestead rights in 240 acres of land in Lancaster County. The trial court dismissed the case after a full hearing, and plaintiffs have appealed.
>
> "Felix Cunningham, a married man, held the legal title to the land, and, describing himself as a single man, deeded it to Frank McKelvie, May 5, 1897. For full value, the latter deeded the land to Joseph H. Marshall, who willed it to defendant, his wife. He died June 15, 1907. Felix Cunningham is dead. Four of his five children are plaintiffs. His wife was divorced, and is not a party to this action. During the time covered by the asserted acquisition and occupancy of the homestead pleaded, the wife and all of the children, except the oldest son, lived in New York, and never saw the premises in controversy. A fair interpretation of all of the evidence leads inevitably to the conclusion that neither the father nor his oldest son ever acquired, occupied or claimed, when in possession, a homestead in the land, within

> the meaning of the homestead law. An analysis of the evidence upon which this conclusion rests would neither benefit the parties nor make an addition to the law, and will not be attempted. For failure to establish this material fact, the case of plaintiffs entirely fails. The decree conforms not only to the law, but to the demands of equity."

This decision fixes the meaning of the homestead statute as if such meaning had been specifically expressed therein.

Knights of Pythias v. *Meyers*, 265 U. S. 31, 68 L. Ed. 891.

Petitioners seek to distinguish the case by merely referring to that part of the opinion in which the court said:

> "Neither the father nor his eldest son ever acquired, occupied or claimed, when in possession, a homestead in the land within the meaning of the homestead law."

It was, of course, unnecessary in Nebraska that any declaration or claim of homestead be filed in any court or public office or otherwise. Why, then, did not the court find that the grantor never acquired, occupied or claimed a homestead? The reason is plain. The homestead law was enacted for the protection of the family and where the wife had never been in the state and refused to come, as in this case, the spirit of the law could not apply. Not even the fact of residence on the land with a minor son was considered within the spirit or purpose of the homestead law.

There is nothing in this case to distinguish it from *Cunningham* v. *Marshall*. Points of difference are on the contrary against the claim of petitioner. In this case, the husband alone lived on the land. There were no minor children. The wife, never a resident of the

United States, had been separated from her husband for 54 years and had constantly refused to come to America.

The court did not dwell upon the reasons for its conclusion, but if they had been given, they would probably have been along the lines declared by the Supreme Court of North Dakota in *Tromsdahl* v. *Nass*, 146 N. W. 719, and *Buffington* v. *Grosvenor*, 46 Kan. 730.

The conclusion reached by the Supreme Court of Nebraska in the present case is the only conclusion proper under the existing laws and decisions of Nebraska. At the time Knudson made the deeds, it was established law in Nebraska.

1. That under Section 1224, Compiled Statutes of Nebr. 1922, the signature of a non-resident spouse was unnecessary.

2. That the signature of a non-resident spouse was unnecessary, even though the husband was occupying the land, together with a minor son, if the wife had never lived in Nebraska.

Cunningham v. *Marshall*, 94 Neb. 302.

3. The court was required to apply the treaty in the light of existing laws and decisions and could not deny to Knudson, a Norwegian subject, the same right to freely dispose of his lands which a Nebraska citizen would have had under like circumstances.

In other words, under *Cunningham* v. *Marshall*, had Knudson completed his naturalization and become a Nebraska citizen, the court would have held that the conveyance without the signature of his wife, a resident of Norway, would have been valid. To hold that the deed was not valid because Knudson had not completed his

naturalization, but remained a Norwegian subject would have denied to him the right to freely dispose of his property, guaranteed by the treaty.

Counsel for petitioners strenuously argue that the treaty should be so construed to avoid conflict with the Nebraska statute, and urge this as a rule of interpretation of treaties. Counsel in a supplemental brief cite numerous cases to the effect that an act of congress and a treaty should be construed so that both can stand and be given effect, if possible. Counsel then says:

> "While these quotations are from decisions construing federal statutes and treaties there seems to be no reason why the same ruling should not apply to a construction of a state's statute in conjunction with a treaty."
>
> (Petitioner's supplemental brief, p. 7.)

There is a very good reason why the same rule is not applicable to a state statute that is applicable to an act of congress. A federal statute is co-ordinate in rank with a treaty; a state statute is inferior and subordinate to a treaty.

This court in a very late case completely shatters the argument of counsel in the holding in *Nielsen* v. *Johnson*, 279 U. S. 47, 49 Sup. Ct. Rep. 223, where it is held:

> "Since the treaty-making power is independent of and superior to the legislative power of the states, meaning of treaty provisions liberally construed is not restricted by any necessity of avoiding possible conflict with state legislation, and, when so ascertained, must prevail over inconsistent state enactments."

We submit that the requirement that a non-resident alien wife consent to and join in a conveyance of real estate

is a substantial and material restraint upon the right of an alien to freely dispose of his goods and effects, and that the Supreme Court of Nebraska in upholding the deeds of Christian Knudson merely followed the general rule of treaty construction that where a treaty provision fairly admits of two constructions, one restricting and one enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred.

Nielsen v. *Johnson*, 279 U. S. 47, 49 Sup. Ct. Rep. 223.

Jordan v. *Tashiro*, 278 U. S. 123, 49 Sup. Ct. Rep. 47.

Asakura v. *Seattle*, 265 U. S.232, 44 Sup. Ct. Rep. 515.

Tucker v. *Alexandroff*, 183 U. S. 424, 44 Sup. Ct. Rep. 195.

In Re Ross, 140 U. S. 453, 11 Sup. Ct. Rep. 897.

Geofroy v. *Riggs*, 133 U. S. 258, 10 Sup. Ct. Rep. 295.

It is hard to see how petitioners are in any position to complain of the ruling of the Nebraska Supreme Court. The rights which they are accorded under the treaty do not arise until the death of the alien owning property. Their rights are to receive the property the alien owned at the time of his death by succession even *ab intestato* without having occasion to take out letters of naturalization, and exempted from all duty called *"droit de detraction."* The provision with reference to freely disposing of his goods and effects applies only to the alien owning the property and not to his heirs. The decision of the Nebraska Supreme Court was in favor of the treaty and against the statute. No rights which petitioners had under the treaty were prejudiced by the rul-

ing of the Nebraska Supreme Court, and in the absence thereof, they are not in a position to complain of its ruling.

II.

The due process of law and equal protection of the law's clauses of the Federal Constitution do not protect any claim or privilege of homestead growing out of the marital relationship to a non-resident alien wife.

Counsel for petitioners in their brief contend that the construction of the treaty by the Supreme Court of Nebraska violates the Fifth Amendment to the Constitution of the United States (pp. 28, original brief, pp. 14, supplemental brief). It has been decided time and again by this court that the first ten amendments to the Constitution of the United States apply only to the procedure in federal courts and do not apply to state courts.

Ensign v. *Pennsylvania*, 227 U. S. 592, 33 Sup. Ct. Rep. 321.

Bollen v. *Nebraska*, 176 U. S. 87, 20 Sup. Ct. Rep. 287.

Brown v. *State*, 175 U. S. 174, 20 Sup. Ct. Rep. 77.

However, the Fourteenth Amendment guarantees the same protection as to state courts as the Fifth Amendment does as to federal courts, so that we will take the matter up from that standpoint. We mention this because the decisions by this and other courts that are in point construe the Fourteenth Amendment instead of the Fifth.

Homestead is analogous to dower and is a benefit or privilege conferred by statute. The inchoate interest or expectancy of a wife arising out of a homestead statute

is given by virtue of the marital relationship, and is exactly akin to the inchoate interest or expectancy of dower.

In *Ferry* v. *Spokane, P. & N. Ry. Co.,* 258 U. S. 314, 42 Sup. Ct. Rep. 358, this court held:

> "The right of dower is not a privilege or immunity of citizenship, either state or federal, within the meaning of Const. Art. 4, Sec. 2, nor is the power of the states to regulate it denied by Amendment 14, but at most it is a right attached to the marital relation, subject to regulation by each state as respects property."

In the opinion, written by Mr. Justice McKenna, it is said:

> "Dower is not a privilege or immunity of citizenship, either state or federal, within the meaning of the provisions relied on. At most it is a right which, while it exists, is attached to the marital contract or relation, and it always has been deemed subject to regulation by each state as respects property within its limits. *Conner* v. *Elliot,* 18 How. 591, 15 L. Ed. 497. Neither section 2 or article 4 nor the Fourteenth Amendment takes from the several states the power to regulate this subject; nor does either make it a privilege or immunity of citizenship. *Maxwell* v. *Bugbee,* 250 U. S. 525, 537, 538, 40 Sup. Ct. 2, 63 L. Ed. 1124, and cases cited; *United States* v. *Wheeler,* 254 U. S. 281, 296, 41 Sup. Ct. 133, 65 L. Ed. 270.
>
> "The further contention, based on the Fourteenth Amendment, necessarily is, as counsel urged, that dower is 'fundamental and substantial'—a property right, being, while inchoate, a chose in action, of which no citizen of the United States wherever he (she) may be resident can be deprived without 'due process of law,' and as to which every person is entitled to the 'equal protection of the laws' as provided in the Fourteenth Amendment of the constitution.

"The Circuit Court of Appeals (268 Fed. 117) considered this contention, and it is difficult to add anything to its opinion. It is pointed out that the Oregon statute was taken from the laws of Michigan adopted in 1846 and sustained. The example of Michigan was followed in Wisconsin, Kansas and Nebraska, and sustained by the courts of those states. To the decisions of those courts we may add *Thornburn* v. *Doscher,* (U. S. Circuit Court for Oregon) 32 Fed. 810, which sustained the Oregon statute, as did the Supreme Court of Oregon in *Cunningham* v. *Friendly,* 70 Ore. 222, 139 Pac. 928, 140 Pac. 989. And we may add also *Richards* v. *Bellingham Bay Land Co.,* 54 Fed. 209, 4 C. C. A. 290, which decided to be legal a like statute of the state of Washington. And Blackstone speaks of dower as having become 'a great clog to alienation' and 'otherwise inconvenient to families.' 1 Washburn on Real Property (5th Ed.) 278, in note.

"The cases recognize that the limitation of the dower right is to remove an impediment to the transfer of real estate and to assure titles against absent and probably unknown wives. And such is the purpose of the Oregon statute, and the means of executing the purpose appropriate, and a proper exercise of classification. It satisfies, therefore, the constitutional requirement of the equal protection of the laws; and we proceed to the inquiry whether the statute is otherwise valid.

"Appellant's contention is that though she be living in New York, it is her privilege under the Fourteenth Amendment to resist the law of Oregon as a limitation of her dower rights, that is, a limitation of rights in property situated in Oregon. The contention might be tenable if the legislature of a state was required to grant dower rights. As repellent of that proposition, the difference the laws of the states exhibit in the rights that attach to the marriage relation may be adduced. The states greatly differ as to what lands

are dowable, and as to what claims are paramount to dower, and to some extent, how it will be barred. 4 Kent 35 *et seq.*

"The granting of dower, therefore, is a matter of statutory regulation. It was so decided by the United States Circuit Court of Oregon in 1887 (*Thornburn* v. *Doscher, supra*), Judge Deady expressing it as follows:

"'It rests with the legislature to say what interest, if any, married persons shall have in the property of each other, as an incident of the relation between them. It may give or withhold dower altogether; or it may for the security of titles, and the protection of innocent purchasers, provide that a non-resident woman whose very existence is probably unknown within the state, and is practically disavowed by the husband, shall not be entitled to dower of lands which he has disposed of without her concurrence or consent, and ostensibly as a single man.'"

There is not much that can be added to the foregoing opinion by this court. As stated therein: "It rests with the legislature to say what interest, if any, married persons shall have in the property of each other, as an incident of the relation between them." The alien law of Nebraska of 1889, and the re-enactment of the alien law in more sweeping terms in 1921, operated to prevent petitioner Marie Tollefsen Todok from holding an expectancy or interest under the Nebraska homestead statute. The fact that the Nebraska Supreme Court found it necessary to deal with her claim to homestead benefit purely from the standpoint of the treaty is a sufficient declaration by that court that she had no right under the Nebraska homestead statute independent of the treaty. The same legislative policy that the court in the Ferry case comments on as adopted by Nebraska as a protection

against absent and probably unknown wives with respect to dower is applicable to homestead.

Let us see what the Nebraska Supreme Court has said with reference to the constitutionality of this legislative policy. In *Miner* v. *Morgan*, 83 Neb. 400, 119 N. W. 781, it is said:

> "One provision on which defendant's argument is based appears in both the state and federal constitutions and declares that no person shall be deprived of property without due process of law, and another is Section 25, Article 1 of the state constitution, which provides that 'No distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment or descent of property.' In other states similar legislation has been upheld, when thus attacked. It rests on the inherent power of the state government over the marriage relation, the means by which land within the state may be transferred by husband or wife, the interest each shall have in the property of the other, the descent or testamentary disposition of both realty and the protection of titles. In both Kansas and Wisconsin a statute like our own was sustained. *Buffington* v. *Grosvenor*, 46 Kans. 730, 27 Pac. 137, 13 L. R. A. 282; *Bennett* v. *Harms*, 51 Wis. 251, 8 N. W. 222. In discussing a statute like the one under consideration, the Circuit Court of the United States for the District of Oregon said: 'It rests with the legislature to say what interest, if any, married persons shall have in the property of each other, as an incident of the relation between them. It may give or withhold dower altogether, or it may, for the security of titles and the protection of innocent purchasers, provide that a non-resident woman whose very existence is probably unknown within the state, and is practically disavowed by the husband, shall not be entitled to dower of lands which he has disposed of without her concurrence and ostensibly as a single man.' *Thornburn* v. *Doscher*, (C. C. A.) 32 Fed. 812.

"The statute does not violate the constitutional provisions upon which defendant relies, and the construction adopted in *Atkins* v. *Atkins*, 18 Neb. 475, 25 N. W. 724, is followed."

In *Buffington* v. *Grosvenor*, 46 Kan. 730, 27 Pac. 137, 13 L. R. A. 282, where a similar legislative policy was sustained against attack on the ground of unconstitutionality, it is said:

"For reasons that were deemed sufficient, the legislature made the signature and conveyance of the non-resident wife unnecessary. The fact that the wife did not accompany her husband to Kansas or had abandoned him and gone to another state, and may or may not have obtained a divorce elsewhere, thus leaving the status of the parties in doubt, and making it difficult to obtain a perfect transfer of land in many cases, may have been deemed sufficient reason for prescribing this rule of conveyance. The statute was enacted shortly after the admission of the state, and when it was rapidly increasing in population, through immigration from many of the eastern states, and also foreign countries, many coming without their wives and families; and possibly the rule was adopted to avoid inconvenience and deception in the transfer of real property. The 'immunities' and 'privileges' referred to in the federal constitution would not, in any event, include the claim made by the plaintiff."

Michigan, Kansas, Wisconsin and Nebraska, as pointed out by this court in the Ferry case, supra, all have statutes permitting one spouse to convey real estate alone where the other spouse is a non-resident of the state. All of these four states have homestead statutes. Construing the statutes together, these states have uniformly held that where the wife is a non-resident, a conveyance by the husband alone of property falling within the

statutory definition of the husband's homestead is valid.

Stanton v. *Hitchcock*, 64 Mich. 730, 31 N. W. 386.

Standard v. *Jewell*, 206 Mich. 169, 172 N. W. 407.

Jenkins v. *Henry*, 52 Kan. 608, 35 Pac. 216.

Ekegren v. *Marcotte*, 159 Wis. 520, 150 N. W. 969.

Cunningham v. *Marshall*, 94 Neb. 302, 143 N. W. 197.

The only questions before this court of federal jurisdiction are whether an inchoate interest or expectancy arising out of the Nebraska homestead statute by virtue of the marital relationship are protected to a non-resident alien wife so as to prevent transfer without her signature by her husband by (1) the treaty with Norway or (2) the due process and equal protection of the law's clauses of the federal constitution. We submit that the legislature of Nebraska has the right to deny on account of non-residence any such inchoate interest in the wife, and that its right to do so is not abridged by either the treaty or the federal constitution.

The judgment of the Supreme Court of Nebraska is clearly right and should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 412.—October Term, 1929.

Mari Tollefsen Todok and Knute C. Engen, Petitioners,
vs.
Union State Bank of Harvard, Nebraska, a Corporation; Leroy A. Megrue, et al.

On Writ of Certiorari to the Supreme Court of the State of Nebraska.

[May 19, 1930.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Christian Knudson, a native and citizen of Norway, came to this country in 1868 and settled in Nebraska in 1878. He was never naturalized. He established a homestead on 160 acres of land in Hamilton County, Nebraska, and resided there until he died intestate in August, 1923. His father and mother made their home with him until their death, and his son Knute C. Engen, who came to Nebraska in 1893, also lived with him for a time. The wife of Knudson remained in Norway. In July, 1923, Knudson executed deeds of the homestead to his nieces and their husbands, and these grantees conveyed the property to the Union State Bank of Harvard, Nebraska.

This suit was brought by the son of Knudson, Knute C. Engen, in the District Court of Hamilton County to cancel the conveyances of the land upon the ground that they were obtained by fraud. The widow of Knudson, Mari Tollefsen Todok, who had not joined in the deeds, was made a defendant. By her cross petition she attacked the conveyances, alleging that the property constituted a homestead in which she had an undivided one-half interest. The other defendants answered her cross petition, and in her reply she set up the right to take the real estate of her deceased husband by virtue of the treaty of amity and commerce between the United States and Norway.

The District Court determined that no fraud had been practiced in obtaining the deeds from Knudson, but that these, and the later conveyances dependent upon them, were void upon the ground that the land was homestead property the title to which remained in Knudson until his death and then descended to his widow and his son. The Supreme Court of the State sustained the decision of the District Court with respect to the issue of fraud, but reversed the judgment upon the ground that, under the treaty with Norway, Knudson was entitled to convey the property and that his grantees took title under his deeds. *Engen* v. *Union State Bank*, 223 N. W. 664. This Court granted a writ of certiorari, 280 U. S. —.

We are not called upon to decide as to the validity under the homestead law of Nebraska of a deed of the homestead by the husband when the wife is an alien who has never come to this country and made the homestead her home. We accept the decision of the Supreme Court of the State that, aside from the effect of the treaty, Knudson's conveyances were void under the law of the State. That Court, referring to the statutes of Nebraska as to homestead property, and their application to the present case, said (223 N. W. p. 667):

"For, if we consider the provisions of section 2819 and section 2832, Comp. St. 1922, as applicable to the subject of the present action, it necessarily follows that certain property within the purview of the treaty before us 'can not be conveyed . . . unless the instrument by which it is conveyed . . . is executed and acknowledged by both husband and wife', and also that such property (homestead) 'vests on the death of the person from whose property it was selected, in the survivor, for life, and afterwards in decedent's heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will.

"The statutory provisions referred to thus assume the nature of limitations, qualifications, or modifications of the treaty itself, and, if valid, would necessarily change its true construction. Each of these provisions of the legislative enactment must therefore be considered to be *pro tanto* inconsistent with the terms of the controlling treaty properly construed. The conclusion follows that, to the extent inconsistent with the terms of the treaty, the statutory provisions are inoperative. The unquestioned rule of construction requires that the provisions of the treaty must be liberally construed and given full force and effect 'anything in the Constitution or laws of any state to the contrary, notwithstanding.' Therefore,

the legal effect of the conveyances executed by Christian Knudson must be determined wholly by the powers conferred on him by treaty, and not by the inconsistent limitations and restrictions prescribed in the Nebraska homestead act."

The only question before us is as to the construction of the treaty. The provision invoked is Article 6 of the treaty with Sweden of April 3, 1783 (8 Stat. 60, 64), revived by the treaty with Sweden and Norway of September 4, 1816 (8 Stat. 232, 240) which was replaced by the treaty with Sweden and Norway of July 4, 1827 (8 Stat. 346, 354) now in force with Norway (Sen. Doc., 61st Cong., 2d sess., No. 357, vol. 48 (2 Malloy), p. 1300). This article is as follows:

"The subjects of the contracting parties in the respective States may freely dispose of their goods and effects, either by testament, donation or otherwise, in favor of such persons as they think proper; and their heirs in whatever place they shall reside, shall receive the succession even *ab intestato*, either in person or by their attorney, without having occasion to take out letters of naturalization. These inheritances, as well as the capitals and effects which the subjects of the two parties, in changing their dwelling, shall be desirous of removing from the place of their abode, shall be exempted from all duty called *'droit de detraction'* on the part of the government of the two States respectively. But it is at the same time agreed, that nothing contained in this article shall in any manner derogate from the ordinances published in Sweden against emigrations, or which may hereafter be published, which shall remain in full force and vigor. The United States on their part, or any of them, shall be at liberty to make, respecting this matter, such laws as they think proper."

It was at one time supposed that the phrase "goods and effects" in this article did not cover real property, a construction which was due in some measure to the view that the treaties of the United States could not affect the operation of the laws of the several States of the Union with respect to the inheritance of land. Opinion of Attorney General Wirt, July 30, 1819, 1 Op. A. G. 275. This view of the treaty-making power of the United States is not tenable. *Hauenstein* v. *Lynham*, 100 U. S. 483, 489; *Geofroy* v. *Riggs*, 133 U. S. 258, 266, 267; *Sullivan* v. *Kidd*, 254 U. S. 433; *Neilsen* v. *Johnson*, 279 U. S. 47. The text of the treaty of 1783 with Sweden was in French only, and the French text is therefore controlling. The phrase "goods and effects" is a translation of the French expression "*fonds et biens*". The French word "*biens*" has a wider

significance than the English word "goods" (used by the American translator) and embraces real property. Story observed upon this point: "The term *'biens'*, in the sense of the civilians and continental jurists, comprehends not merely goods and chattels as in the common law, but real estate." Conflict of Laws, chap. 1, sec. 13, *note*. In a note addressed by the Swedish Minister at Washington to the Department of State under date of December 12, 1910, in reponse to an inquiry by the Secretary of State of the United States, the Swedish Minister stated his understanding that the authorities in Sweden had always held that the words "goods and effects" in article 6 of the treaty of 1783 include real estate. This view has been taken in judicial decisions in this country. *Adams* v. *Akerlund*, 168 Ill. 632; *Erickson* v. *Carlson*, 95 Neb. 182. We think that it is the correct construction of the article of the treaty, applying the fundamental principle that treaties should receive a liberal interpretation to give effect to their apparent purpose. *Geofroy* v. *Riggs, supra; Tucker* v. *Alexandroff*, 183 U. S. 424, 437; *Jordan* v. *Tashiro*, 278 U. S. 123, 128; *Nielsen* v. *Johnson, supra*.

The question remains whether the treaty operates to override the law of the State as to the disposition of homestead property. If so, it would appear to place an alien owner of a homestead in Nebraska on a better footing than that of a citizen of the State. This conclusion seems to us to be repugnant to the purpose of the treaty. While treaties, in safeguarding important rights in the interest of reciprocal beneficial relations, may by their express terms afford a measure of protection to aliens which citizens of one or both of the parties may not be able to demand against their own government, the general purpose of treaties of amity and commerce is to avoid injurious discrimination in either country against the citizens of the other. Compare *Frederickson* v. *Lauenstein*, 23 How. 445, 447; *Geofroy* v. *Riggs, supra; Maiorano* v. *Baltimore & Ohio R. R. Co.*, 213 U. S. 268; *Patsone* v. *Pennsylvania*, 232 U. S. 138; *Petersen* v. *Iowa*, 245 U. S. 170; *Duus* v. *Brown*, 245 U. S. 176; *Sullivan* v. *Kidd, supra*. This purpose is indicated in the recital of the treaty of 1783 with Sweden that the high contracting parties thought that they could not better accomplish the end they had in view "than by taking for a basis of their arrangements the mutual interest and advantage of both nations, thereby avoiding all those burthensome preferences, which are usually sources of debate, embarrassment and discontent."

It is not to be supposed that the treaty intended to secure the right of disposition in any manner whatever regardless of reasonable regulations in accordance with the property law of the country of location, bearing upon aliens and citizens alike. For example, conveyances of land would still be subject to non-discriminatory provisions as to form or recording. Nor can the right to "dispose", secured by the treaty, be deemed to give a wholly unrestricted right to the alien to acquire property, without regard to reasonable requirements relating to particular kinds of property and imposed upon both aliens and citizens without discrimination.

It is true that the policy of Nebraska with respect to the selection of homesteads was established after the treaty in question was made. (General Laws, Nebraska, 1879, pp. 57, *et seq.*). But we find no ground for the conclusion that in establishing this reasonable policy Nebraska took any action which was inconsistent with the provisions of the treaty. The citizens of Norway and Sweden who settled in Nebraska had no reason to complain of that policy and had obtained no right to ignore it. The homestead property under the law of Nebraska has a special quality. It is exempt from judgment liens and from executions or forced sale, except as specially provided (Nebraska, Comp. St. 1922, sec. 2816). The acquisition of the homestead with these incidents depends upon the *bona fide* intention to make it a home. *Hair* v. *Davenport*, 74 Neb. 117. It is because of this quality that it enjoys special privileges, and that it cannot be conveyed or encumbered unless the instrument is executed and acknowledged by both husband and wife.

When Knudson selected the homestead, he sought the advantages of the provisions of the local law as to homesteads, and he could not properly obtain the benefits of these provisions without accepting the property with the quality which the law attached to it. If he had not been entitled to establish the homestead, and thus his acquisition lay outside of the homestead law, it would be clear that the statutory provision against disposition of the homestead would have no application and there would have been no occasion for the Supreme Court of the State to cite the provisions of the treaty in order to strike down the prohibition against conveying the property. We are unable to see that anything in the treaty, which was continued in force with Norway, gave Knudson the right to establish a homestead and then hold it free from the re-

strictions which governed it as a homestead, restrictions which operated upon every citizen of Nebraska who owned a homestead.

Our conclusion is that the treaty did not invalidate the provisions of the Nebraska statute as applied to the present case in relation to the disposition of the land considered as homestead property.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.